In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

FORREST S. TUCKER,

Respondent.

No. 70-86

Washington, D. C.
November 11, 1971

Pages 1 thru 47

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 70-86
FORREST S. TUCKER, Respondent.	:	

Washington, D. C.,

Thursday, November 11, 1971.

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

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associated Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

ALLAN A. TUTTLE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

WILLIAM A. REPPY, JR., ESQ., Duke University Law School, Durham, North Carolina 27706, 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. 86, United States against Tucker.

Mr. Tuttle, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.,

ON BEHALF OF THE PETITITIONER

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

This case involves the question of the propriety of the use in a 1953 sentencing hearing and sentencing proceeding of records of prior convictions in 1938, 1946, and possibly 1950, which were obtained in the absence of counsel, or alleged to have been obtained in the absence of counsel.

Tucker was convicted in 1953 of the robbery of a federally insured savings and loan association. He was convicted in the United States District Court for the Northern District of California.

Now, the evidence in the case, which consisted of four eyewitnesses and fingerprint evidence and testimony, is concededly overwhelming, and the validity of his conviction and the strength of the evidence against him is not challenged in this proceeding or before this Court.

Tucker took the stand in his own defense in these proceedings, in that trial, and he was cross-examined with respect to certain prior State felony convictions.

He was cross-examined with respect to and admitted a 1938 conviction for theft of an automobile. He was cross-examined and admitted a 1946 jewelry store robbery in Louisiana. He was cross-examined with respect to and admitted a conviction for armed robbery in 1950.

He was shortly thereafter convicted of the crime of robbery of a federally insured savings and loan association.

Thereafter, the judge, the trial court conducted a sentencing hearing, at which it took evidence with respect to the defendant Tucker. With respect to these convictions, which I have mentioned, certain further evidence was brought out.

It was brought out, with respect to the 1938 automobile theft conviction, that he had served seven of the ten years which had been imposed. With respect to the 1946 jewelry store burglary, that he had served 45 months out of a four-year sentence. And with respect to the 1950 armed robbery conviction, that he had served no time because he had escaped after a sentence of five years was imposed.

Other information respecting the defendant was also brought out. It was brought out, for instance, that he was under indictment in Los Angeles for another federal armed bank robbery, which was to proceed to trial immediately after this sentencing. It was brought out that he was a suspect in four other federal bank robberies and seven or eight armed robberies of local savings and loan associations in the San Francisco

area. And the evidence with respect to those robberies was elicited. That is to say, that there was evidence, eyewitness testimony and fingerprint testimony with respect to those other charges and investigations against the defendant Tucker.

Tucker was sentenced to the maximum permissible term under the statute providing for armed bank robbery of a federally insured bank, which is 25 years.

Now, later on the same year, the State of California brought proceedings against Tucker for armed robbery, and he was convicted of four armed robberies under California law. This proceeding occurred under the California recidivist statute, so that the indictment in that case charged the four armed robberies and in addition charged two of the three prior felony convictions I've mentioned, the 1938 auto theft and the 1946 jewelry store burglary.

Following this Court's decision in Gideon vs. Wainwright, Tucker successfully attacked first his habitual offender status in California and later on the underlying California conviction for armed robbery, on the ground that the use of those two priors had been prejudicial, inasmuch as he had not had counsel in 1938 and he had not had counsel in 1946.

Now, following the State court's vacation of those two prior, 1938 and 1946, convictions; that is to say, its finding that there had been no counsel, Tucker brought a motion under 2255 attacking the conviction which is the subject of

this case, the bank robbery conviction, alleging that the use in cross-examination of those two priors which were concededly uncounseled, and also alleging that the use of the 1950 conviction which had theretofore not been challenged as counseled or uncounseled, had prejudiced him when it was used for cross-examination and impeachment purposes.

Now, the District Court and the Court of Appeals both found that the use of uncounseled priors was improper, but they found that the error was harmless because of the overwhelming evidence against the defendant in the case.

The Court of Appeals, however, found further that those priors had been used at the sentencing hearing, and at the sentencing hearing the judge might possibly have relied upon them, and the Court of Appeals said that the reliance couldn't be harmless beyond a reasonable doubt under Chapman and remanded the case for resentencing without the use or reliance upon the uncounseled prior convictions.

Therefore, the case is before this Court now at the request of the United States to determine whether the Court of Appeals was correct in remanding that case for reconsideration of sentence.

The question which this case presents in this Court is whether a particular rule of evidence, specifically an exclusionary rule of evidence, should be applied to sentencing proceedings so as to deprive the sentencing judge of knowledge

or reliance upon prior convictions which were obtained without the assistance of counsel prior to Gideon. And it seems to be common ground among all the parties in this case that a judge should have access to and should be entitled to rely upon all reliable relevant information concerning a defendant's character, background, habits, or disposition, which can be brought before the sentencing judge.

Q Are the prior convictions which are at issue here, were they pleas of guilty or not?

MR. TUTTLE: The 1938 auto theft conviction was a plea of guilty. The 1946 burglary, jewelry store robbery, was a plea of guilty.

Before this morning I had been of the impression that the 1950 conviction had not been challenged. Within the hour, Mr. Reppy showed me a copy of the 2255 motion in District Court, which was not made a part of the record certified to this Court, which indicates they also challenged the 1950 conviction.

Now, the 1950 --

Q Was that a plea of guilty?

MR. TUTTLE: I believe it was, but I simply don't know, because I had thought that that conviction was not being challenged before this Court. We are informed by the clerk of the Dade County Court, because we inquired with respect to this, that petitioner did have counsel during the 1950 proceeding.

I should say that the respondent Tucker alleges in his

brief that he didn't have counsel. That question was never decided, Mr. Justice White, because that 1950 conviction was not one of the two priors that was alleged in the California recividist prosecution, and therefore not one of the priors with respect to which a hearing has been held.

Q Well, what did the Court of Appeals in this case say? Did it just refer to the two?

MR. TUTTLE: The District Court simply held that the use of priors, uncounseled priors, without making specific findings, but acknowledging the United States admission with respect to the '38 and '46 priors, that they were uncounseled, said that the use of uncounseled priors in cross-examination would be bad.

Q Don't you think it makes a difference in this case for your argument as to whether the prior convictions at issue were pleas of guilty or not?

MR. TUTTLE: I don't think that that is a dispositive consideration, Mr. Justice White. I know that the two, '38 and '46, were pleas of guilty. As I say, I had believed until today that the 1950 conviction was not being challenged at all.

Q Did he deny the previous convictions or the crimes at the trial?

MR. TUTTLE: At the trial, and I think this is quite significant, he neither denied the convictions nor, as I wanted to say with respect to the 1938 and 1946 convictions, he not

only did not deny those convictions, he admitted those convictions, but he went further, he admitted the underlying conduct.

Q So he not only didn't deny the underlying conduct but he admitted it by his plea of guilty?

MR. TUTTLE: He admitted the underlying conduct and I think that insofar as there might be a question about the reliability of uncounseled conviction, this cannot be considered in the facts of this case.

I call the Court's attention to page 24 of the Appendix. With respect to the 1938 automobile theft, the question about that conviction:

"Answer: It boils down to this, I was 17 years old, broke into a man's garage, took his automobile, went joy riding in it, and received a ten-year sentence for it."

So he admits the conduct. He says it was joy riding, but he admits he took the car and went from the man's garage.

With respect to the 1946 jewelry store burglary, against on page 24: "I broke into a jewelry store." And on page 25: "Where?" "New Orleans."

"Question: Day or night?

"Answer: At night."

So that with respect to those two convictions, the question of whether counsel -- whether the absence of counsel makes the conviction unreliable does not appear before this

Court.

With respect to the 1950 conviction, we -- the record as it now stands indicates that there had been no determination, first of all, whether there was counsel or not, no judicial determination. We have made inquiries and we have been told and we recite in our brief that the Dade County Clerk indicates to us that counsel was supplied.

The respondent Tucker, in his brief, says that he didn't have counsel, and there has been no determination of that fact.

But we submit that it seems to us that all of the considerations of modern criminology calling for the individuation of punishment require that a sentencing judge have all relevant information before him which would help him in determining that punishment; and that would include evidence of uncounseled convictions.

The application of ordinary rules of evidence, or, in particular, an exclusionary rule of evidence to the sentencing proceedings would, it seems to us, deprive the judge of valuable information concerning a defendant's background, a defendant's character, and disposition.

Now, in Williams vs. New York, this Court specifically refused to apply ordinary rules of evidence to sentencing proceedings, and specifically recognized that the application of ordinary rules of evidence would frustrate the purpose of

individuation of punishment.

You will recall that in Williams the judge had a report that the defendant was involved in some 30 other burglaries, in addition to the murder which was the charge in the indictment.

Q Just hearsay information, too, was it not?

MR. TUTTLE: Just hearsay information, Your Honor. And this Court -- and the judge relied upon it, said he relied upon it, acknowledged that there had been no convictions resulting from those reports of other burglaries, and, as you will recall, sentenced Williams to death.

Now, in this case also the sentencing judge had before him substantial information concerning this defendant's criminal activity, which had not resulted in a conviction, uncounseled or not, or an indictment. There was the allegation that this defendant had been involved in four federal bank robberies, the allegation that he had been involved in seven or eight armed robberies of savings and loan institutions, and the sentencing judge was told by the witness he was examining for this purpose that the evidence was substantial, that it was substantially the same as it had been in this trial, that is eyewitness testimony and fingerprint testimony.

And the use of that information, which is allegation of criminal conduct falling short of a conviction, counseled or not, is not challenged in this Court.

It seems to us that it would be ironical if it were proper for a court to rely upon such hearsay information, as Mr. Chief Justice describes it, rely upon that information in the assessment of sentence, and yet would be deprived of reliance on the same information when it matured into a conviction, merely because the conviction was uncounseled.

Now, we know in this case that there is no doubt that Tucker committed the 1938 and the 1946 violations, because he admitted that he did.

But we submit that even uncounseled convictions, where there have been no such admissions, are no more unreliable than much of the evidence which has historically and traditionally been considered proper for a sentencing judge to rely upon.

We also would point out to this Court that the use of uncounseled convictions in this context, as some evidence of criminality on the part of the defendant, is totally different from the use of such convictions under ordinary recidivist statutes.

There the prior convictions automatically increase the exposure or increase the mandatory minimum, and it's the fact of conviction that creates automatically a harsher sentence. And in that case, we submit, the conviction operates to deprive the judge of discretion, with a mandatory increase in sentence.

Whereas the information here, the uncounseled conviction and the information suggested is merely being used to inform the discretion of the court, to give the most intelligent, individual treatment to a particular offender.

For this reason we think that this Court's holding in Burgett vs. Texas has no application to the facts at bar.

Now, quite apart from the question of whether a sentencing judge should be permitted to rely upon uncounseled convictions, the law seems clear that a sentencing judge can rely upon the conduct which underlies that conviction, and any competent evidence of this criminal conduct, any reports of this conduct would be permissible information for the judge to use even if he couldn't rely upon the fact of the conviction itself.

And we submit that any rule which would exclude the reliance upon such conduct, falling short of a conviction, would deprive the judge of much valuable information which courts have traditionally, historically, and properly relied upon; a charge might be dropped because a prosecuting witness didn't appear, or it might be dropped at an exercise of prosecutorial discretion.

Q Or by the suppression of evidence, some heroin seized from his person.

MR. TUTTLE: That is -- I think that's an important distinction, Your Honor. There are cases, even sentencing

cases, where suppressed evidence has not been used or permitted to be used as information before the sentencing judge. And the rationale of those cases is part and parcel of the whole deterrent rationale of the prospective application.

The theory of the courts that forbid the use of illegally seized evidence in a sentencing hearing, I suggest that if it were permitted, a prosecutor or the police could deprive an individual -- would be encouraged if they had enough evidence to seize a person for a narrow crime, would be encouraged to enage in rampant searches thereafter, figuring that once they could convict him of the narrow crime, they could put in everything else on a sentencing hearing and obtain a maximum sentence.

Q Who was it who said that?

MR. TUTTLE: I'm sorry?

Q Who said that?

MR. TUTTLE: It's a Circuit Court case --

Q What Circuit?

MR. TUTTLE: Your Honor, the case is --

Q Well, if you don't have it, --

MR. TUTTLE: -- Verdugo --

Q -- at your fingertips.

MR. TUTTLE: And I can't tell you the Circuit, but it is cited in the respondent's brief.

But it seems to me that the rationale that -- the

deterrent rationale, which would prohibit the use of that evidence, albeit significant evidence, is distinguishable from this case, where we're only concerned about the issue of reliability.

It's commonplace in presentence reports, for instance, for a probation officer or the prosecutor in taling to the probation officer, to try and put the defendant in a context of criminality, which may not be revealed by the indictment or the trial itself, to give the sentencing judge some idea of this person's place in the entire criminal scheme. That kind of information has always been included in presentence reports, but it's information that may enhance punishment and is not sworn, and is not usually subject to cross-examination, and yet it's information which we feel ought properly to be before the sentencing court.

Further, even regardless of the reliability of the conviction, it seems to us that incarceration that results, as a basis of -- as a result of uncounseled convictions, are information which a sentencing judge should have before him.

The Court will notice in this case, at the age of 17, Tucker is convicted of auto theft. He's sentenced to ten years in jail; he stays in jail until mid-1945, released in mid-1945; he's promptly convicted again in 1946. Stays in jail from 1946 until mid-1949. Released in the middle of 1949, he promptly commits an armed robbery in 1950. He's sentenced on that, and

he escapes. But less than a year later, in 1951, he commits the crime which is the subject of this case.

Thus, from the age of 17 and from 1938 to 1951 Tucker spent the entire intervening period with months exceptions in jail. Now, it seems to us the sentencing judge could not rationally individuate the punishment or the treatment of Tucker in ignorance of those facts. And I think that respondent Tucker really admits that when he suggests that perhaps that information should be before the sentencing judge.

Now, I think, finally, Your Honor, there is no real evidence in this case that the sentencing judge relied upon these prior convictions in imposing the sentence which he did impose.

The judge was specifically told in this case that Tucker was a suspect in four other robberies, federal robberies, seven or eight other savings and loan robberies, and he was told the strength of the evidence with respect to those. He was told about a pending indictment in Los Angeles. Now, the judge specifically said he would not consider the pending indictment in Los Angeles, because, in essence, that case would take care of itself. It would be a sentence appropriate to that offense.

But his statements -- and these occur at the end of the sentencing hearing -- indicate the matters which he truly relied upon, and those are these pending investigations. This occurs on page 37 of the Appendix, and with the Court's permis-

sion, I'll read a few lines.

"I take it" -- and this is the court asking the question -- "you do not present -- you did not present these cases until you determined the fate of this particular case, is that the problem involved?

"The Witness:" -- who is an FBI agent -- "Well, these particular cases I am talking about are local -- they are under the jurisdiction of the local police ... there is no Federal jurisdiction. Now I understand the District Attorney's office in Alameda County is waiting What action they are going to take, I don't know."

And then the court: "I assume that whatever sentence if meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases.

"The Witness: I believe so.

"The Court: All right. Do you have anything further?" And then promptly imposes the 25-year maximum sentence.

We submit that those were the considerations --

Q And who was the witness, who is the person referred to as the witness?

MR. TUTTLE: That is an FBI agent, the man who arrested the defendant in the first instance.

I think there's a further indication of the fact that these particular priors were not relied upon by the

sentencing judge, and that also was only called to my attention within the last hour by Mr. Reppy. Another document which was not included in the record on appeal, but is part of the record below, it appears that in the 2255 motion originally made before the District Judge --

Q In this case?

MR. TUTTLE: In this case. -- Tucker challenged the convictions because of the use of these priors on cross. The judge said harmless error. Tucker then moved -- and this does not appear in the Appendix because it was not certified to this Court -- Tucker then moved for a reconsideration of sentence, on the ground that the sentencing judge, who, incidentally, was the same judge who in 1953 had heard the case, moved for reconsideration of sentence on the grounds of the use of the priors at sentence. The judge's disposition of that was peremptory. He simply said this raises no new issues which require consideration.

Therefore, I think it is clear that the sentencing judge in this case did not feel that those priors had influenced his sentence.

Q Well, hasn't the entire record been lodged here in the Court?

MR. TUTTLE: I believe that it had been. These are documents which Mr. Reppy obtained. They are copies of Tucker's own records, and I had not known them to be part of the record,

I'm at the moment relying upon the representation of Mr. Reppy that these are official records in the case, and they have -- they are not part of the record that was lodged in this Court, because, until this moment, I didn't even know they existed.

Q Well, they're really not part of the record in this case, but they are part --

MR. TUTTLE: They're part of the record in this --

Q They are official court records involving --

MR. TUTTLE: In this case.

Q -- this man?

MR. TUTTLE: In this case.

Q So they are official records in this case?

MR. TUTTLE: In this case. They are simply not lodged in the Court because we didn't know of their existence until --

Q The Clerk just didn't send them up?

MR. TUTTLE: That appears to be what happened.

But I do think that this particular order is significant, because it shows that the very sentencing judge in this case, who had sentenced this man in 1953, when he admits on the substantive question that the use of the priors in cross-examination is bad, and then he says -- then the respondent says, Well, what about the use of them in sentencing? And the sentencing judge says, That doesn't call for any further consideration.

Q Does that appear in the form of an order, or --

MR. TUTTLE: It appears in the form of an order denying a motion for rehearing.

Q So it must have been an item on the docket of the court.

I mean, it must have been a docket entry, of an order?

MR.TUTTLE: I assume that it would be -- I assume that there would be a docket entry, Mr. Justice White. I -- in looking at the record that is docketed here, I didn't find that item, and I have only learned of it within the last hour, but I do submit it's of perhaps controlling significance in this case, because the question might be asked: Well, why not let the judge take another crack at it?

Q You don't mean to suggest that without it you should lose the case?

MR. TUTTLE: Perhaps I should say, Mr. Justice White, that --

Q That's another reason why you should win it?

MR. TUTTLE: -- it is sufficient, but not necessary, for the government's position.

Thank you.

If I have any further time, I'd like to reserve it for rebuttal.

MR. CHIEF JUSTICE BURGER: You have a little left;

we'll give you a measure on it later.

Mr. Reppy.

ORAL ARGUMENT OF WILLIAM A. REPPY, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

Counsel for the United States has characterized this case as an exclusionary rule case. But Mr. Tucker characterizes the case, and I think the Ninth Circuit majority and dissent did also, as a prejudicial error case. And that, Your Honors, it is, so long as Gideon vs. Wainwright is retroactive.

The reason that we are referring, both counsel, in our argument so often to the record and reading portions of the record to the Court is that whether the Ninth Circuit correctly decided this case turns on whether this record offers some hint that an injustice occurred; that perhaps the sentence would have been lower if Judge Harris, in 1953, had realized that there had been no reliable adjudication of guilt of the three prior convictions, 1938, 1946 and 1950.

Q Are these prior convictions the ones that appear on 24 and 25; that is in 1938, breaking in and stealing a car, 1946 the jewelry store, and 19- -- a later period, not identified, breaking into another store in New Orleans? Now, are you talking about those?

MR. REPPY: Those are the same three, Mr. Chief Justice, that were used, both --

Q What difference does it make -- will you tell me what difference it makes, what the circumstances of the convictions were, when, at the time of this hearing, he affirmatively described his conduct to the judge?

MR. REPPY: Well, let me state at the outset that Mr. Tucker, as you will note in his in propria persona written opposition to writ of certiorari, admits guilt of one of those three priors. He claims innocence to two --

Q Well, but is this incorrect, the Appendix pages 24 and 25?

MR. REPPY: No, sir, it is not. Now, you notice, Mr.Chief Justice, that he does not make an admission as to the 1950 prior. Our focus here is on his statement "I broke in and stole a car."

Undoubtedly it can be read as an admission. I think also, in view of what happened, and how this came up, we can construe this portion of the record as Mr. Tucker describing himself as the defendant, describing what he was charged with. Here was the quandary he was in. In error --

Q Well now, do you think his language really is ambiguous? His answer is: "It all boils down to this, I was 17 years old, broke into a man's garage, took his automobile, went joy riding in it, receive a ten-year sentence for it."

Then he repeats: "You broke into a place and stole a car?" "Yes."

"What kind of car did you steal?" "'36 Ford."

"Tell us about your other convictions." "1946 I broke into a jewelry store."

"Where" -- and so forth. He goes on to describe the cities and then still a fourth one, apparently not relied upon, was his admission that he was a fugitive from the State of Florida because he fled his five-year sentence when he was in the hospital for some medical treatment, away from the prison.

Now, do you suggest that the court, the sentencing court can't take into account his conduct in sentencing as distinguished from the recidivist factor?

MR. REPPY: Not at all. No, we do not view the Ninth Circuit ruling in any way as precluding the court, upon remand, from considering the conduct. In fact the Ninth Circuit's majority concluding paragraph specifically states that the resentencing is to occur without any consideration of invalid convictions. And unquestionably, if his resentencing hearing is held, the conduct involved would be gone into.

Q Well, if the invalid conviction is supported now by what amounts to a judicial confession in open court, at a time that he's represented by counsel, would you still maintain that?

MR. REPPY: Yes. For two reasons: some judges in the

exercise of their discretion at sentencing simply do not consider charges and proof of guilt other than a conviction. The authorities which are recited in respondent's brief make that clear.

The particular reason isn't given. It seems to be a compartmentalization by the judge, a rule-of-thumb: I consider convictions, I do not consider charges which have not resulted in a conviction.

In Connecticut, for example, the judges do not consider charges that have not resulted in a conviction.

Now, how Judge Harris approached this, we can only speculate, as we know that he would not consider the Los Angeles charge, because that was coming up to trial, and what he stated, and what Mr. Tuttle read, on page 37, as to the Northern California charges in State court, I would submit, is simply ambiguous. It may be saying, I know I'm giving a heavy sentence on the basis of what occurred, and I do realize that it may be increased, but I hope it won't be.

I think that the remand procedure would bring the clarification that we want; and finally, Mr. Chief Justice --

Q As to the third of these convictions, the one from which he fled, when he was in the hospital, fled to California, he said right at the time of sentencing, as I read it, that he was innocent of that. I'm looking at page 35, the defendant's statement to the sentencing judge.

MR. REPPY: Mr. Justice --

Q Do I read that inaccurately?

MR. REPPY: I do believe you do, Mr. Justice. He was going to say the word "both" after the word "of". If you notice the context there, he describes the prior convictions --

Q Yes.

MR. REPPY: -- "and the five-year sentence that was given me", that's 1950, "I was convicted by a judge -- the same judge that gave me the five, gave me the ten to start with," -- that's 1938 in Florida --

Q Yes.

MR. REPPY: -- "and I was innocent of" and he stops.

Q Then he says, "that's neither here nor there".

MR. REPPY: "That's neither hear nor there" and --

Q "But I mean he found me guilty and subsequently I escaped and came out here."

MR. REPPY: I think it's susceptible of the interpretation consistent with his in propria persona opposition to the writ, that he considers both of his Florida convictions improper, in that "I was innocent of" both is what he was going to say. But now that we have read this passage, which I planned to read later to the Court, I would like to consider why Mr. Tucker stopped his explanation on allocution, he was beginning to give evidence in mitigation, to explain, and he then stopped suddenly, and he says, "that's neither here nor there", and

there seems to be only two possible reasons that he stopped: the first one is that he realized, or believed that the convictions then not subject to collateral attack, because Gideon had not been decided, were conclusive. And, as noted in respondent's brief, there was considerable authority at that time that that was so, whether that be authority that commends itself to our logic, it seems to be irrelevant because defense counsel, who was there at sentencing, perhaps had told Mr. Tucker not to get into that.

The other possibility is that Mr. Tucker felt he would simply urge Judge Harris, by protesting innocence, of matters for which he stood, as the law then read, validly convicted. And Judge Leventhal of the D. C. Circuit, in his concurring opinion in the Scott case, which is cited in respondent's brief, states that the overwhelming majority of sentencing judges, in his view, do not like to see a defendant before him protecting innocence after a lawful conviction.

So it's quite possible that had Mr. Tucker had the benefit of Gideon, Mr. Tucker and his counsel at that time, he would not have stopped, and we would have some explanation here of these incidents, the 1938 incident, when he was 17, and the 1940 -- 1950 incident in Florida. And it is reasonably possible that he might have convinced Judge Harris --

Q But he could have just said, "I was guilty." He didn't have to go into such detail as to say it was a 1936

Ford.

MR. REPPY: Mr. Justice Marshall, I have corresponded extensively with Mr. Tucker, and this material is off the record, I wish I could refer to it before you now. I will just simply say this: there is one other point about what's there on page 24. This statement was the direct result of a Burgett vs. Texas error. Mr. Tuttle, for the government, has conceded it was found by the District Court to be a Burgett vs. Texas error to receive these three priors at the guilt determination.

It was found by the Ninth Circuit to be error. Burgett has been retroactively applied. It's not a matter we have briefed here, but this issue is before the Court, if it looks at page 24, of the transcript here, to determine what happened. Because that is the poisonous fruit of that error. In it came the three priors, which were unreliable and uncounseled, and the poor man, trying to rehabilitate himself in the eyes of the jury, in effect, confesses. He might have been lying -- not likely, but he might have been.

He might have decided the best thing to do was to take advantage of his age, which was 17, and to try to get some sympathy from the jury by, in effect, confessing and saying --

Q This testimony on 24 was -- did occur during the course of the trial before the judge --

MR. REPPY: Yes, and before the jury.

Q -- and then what begins on page 27 is at the

sentencing proceedings; is that right?

Or at page --

MR. REPPY: Yes, where they say that the agent is present in court, this agent, in effect, delivered a verbal sentence report. So, as soon as -- when that begins, the sentencing proceeding has begun.

Q Mr. Reppy, if -- I realize that time has gone by, but suppose that the court had given him something less than the maximum sentence. Would you be here? Would the same principles as in your case apply?

MR. REPPY: I don't -- Mr. Tucker would be out of prison, sir, to begin with. But assuming that, the time difference --

Q Well, that's why --

MR. REPPY: I would be -- I would be here, if he was willing to take the risk of North Carolina vs. Pearce, of a higher sentence, and go back in there and ask for reconsideration, I would be here. Because I think that the remedy that commends itself to the Court, and a remedy which is followed, apparently, in the Fifth Circuit, is that findings should be made by the sentencing judge as to how he was affected by the improper materials before him.

Q Well, first of all, of course, if it were not too much less than the maximum, he might still be incarcerated?

MR. REPPY: That's correct.

Q For 23 years. But it is your position that North Carolina vs. Pearce has application in this kind of a situation?

MR. REPPY: Oh, it is certainly not necessary to decide, but I would assume so, that what the Court wrote there permits a very limited consideration of prison incidence, so long as there is actual proof of them, and that they are not hearsay.

On the procedural matters --

Q Mr. Reppy, do you really want us to hold the responsibility of State judges to make findings before they sentence?

MR. REPPY: No, Your Honor.

Q Well, I thought that's what you said.

MR. REPPY: No, Your Honor. The findings, I feel, should be made upon a Section 2255 motion, if it's a federal prisoner, or upon the State court habeas motion when a State prisoner goes before the judge and says, "Your Honor, you considered information that was wrong."

Since this Court decided Townsend vs. Burke in 1948 there have been, perhaps, two dozen reported cases like this, applying the Townsend vs. Burke principle that due process is denied where there is substantially unreliable information before the judge. And uniform procedures seem to be, Your Honor, to send the petition back to the sentencing judge if he

is available, and get some finding from him, if he can reconstruct it, as to how he was affected.

And I would assume if he cannot reconstruct it, he should make findings as to his normal practice in dealing with prior convictions and arrests. Because, as noted, particularly in the annotation A.L.R. that I've cited, where the annotator went quite -- picked up sentencing decisions from all parts of the country, the majority approach seems to be to simply disregard unadjudicated charges.

Q Well, I don't understand how we can require this finding every time a judge sentences somebody.

MR. REPPY: It would be useful if he made it then, but it is not necessary.

Q I didn't say that, but how can we compel him, just because it's useful?

MR. REPPY: I would not compel it, Mr. Justice Marshall.

Q Well, don't you think we should compel it in the federal courts before we go over in the State courts and compel it?

MR. REPPY: Well, it is not necessary that this federal case here be extended to the State. Because this is a federal conviction, and it arises under 2255, which allows for a non-constitutional collateral attack on sentencing.

Q Right.

MR. REPPY: And if your feeling is that you wish to limit this principle to the federal judicial system, I think it's quite proper to do so, and that there is precedent with the Lewis case in the Court of Appeals, which I have cited in respondent's brief --

Q Do you realize that I would assume that every district, every federal district has a different procedure as to how to handle presentence reports?

MR. REPPY: I'm certainly sure that is so, but I'm not --

Q Do you realize that in most districts today the prosecutor doesn't have anything to do with it?

MR. REPPY: Well, I wasn't aware of that, but I think that the -- regardless of what procedure was originally used at sentencing the procedure mentioned in the Fifth Circuit decision of Putt vs. United States in 1966 is the desirable procedure to handle a collateral attack.

Now, in the Putt case there was a Federal prisoner, a Dyer Act prisoner, sentenced to a federal prison, and he submitted a 2255 motion in which he alleged that the sentencing judge had before him on the presentence report an entry that this man had been convicted of burglary, and an entry that this man had raped someone, a girl, and the judge took this and I believe, although it's not clear, without holding an evidentiary hearing or without appointing counsel, he changed

the record of the sentencing and he made extensive findings as to what he would have done or how he would have reacted had the entries been false and had he known That. And his conclusion was that there was so much other criminal activity on the record that he would have given the same sentence in any event, because the additional burglary and the additional rape didn't make that much difference.

Now, that may be true in our case. There was a lot of criminal activity. But I don't see any reason why it's too much to ask of Judge Harris, who is still sitting, to make these type of findings. I feel that he ought to have done so when the motion originally came up to him, as Mr. Tuttle has indicated, Mr. Tucker, the prisoner and respondent here in propria persona filed a petition under Burgett vs. Texas attacking the conviction-itself on the basis of what we've read at page 24 and what preceded it when the priors were introduced to impeach him. He did not, in his original moving papers, mention the sentence. The government did not, in its reply papers, mention the sentence.

The judge then wrote the opinion, which is in the Appendix, which doesn't mention sentencing at all. The opinion relies heavily on the record to indicate that as far as impeachment went, there was harmless error, because the man was thoroughly -- Mr. Tucker was thoroughly discredited on rebuttal evidence, and this is true. And then, after this opinion came

down from Judge Harris, Mr. Tucker filed what he labeled a petition for rehearing, which goes on for several pages, laying out what happened at sentencing and requesting resentencing.

And Mr. Tuttle has accurately described Judge Harris's response to that. A terse order saying: Rehearing denied. The petition raises no new issue that warrants reconsideration.

And it was a new issue, if the Court please, because instead of weighing the priors as impeaching devices against the testimony of guilt and the discrediting testimony, the judge should have then weighed the priors as evidence of guilt against the other evidence of guilt as was done in the Putt case, to see if it would have made any difference.

Q What would you suggest if it were not the same judge who tried him or sentenced him?

MR. REPPY: I would suggest that if that judge were available, perhaps in retirement --

Q Well, let's say he is not, he's off the bench, he's deceased or --

MR. REPPY: If he's deceased, a sentencing judge or a District Court judge hearing a 2255 motion can only put himself in the position of a sentencing judge, and said, would it have affected me? And I do believe, Mr. --

Q Well, why wouldn't you just set aside the sentence and send it back to the sentencing court for resentencing, before whatever judge is available?

MR. REPPY: If the opinion is -- why should not this Court?

Q No, why wouldn't -- let's assume a 2255 judge finds that uncounseled priors were used, why shouldn't he set it aside and require resentencing? If the prior judge isn't available?

MR. REPPY: That would be proper. And it would seem if he is the sentencing court, he could do the resentencing himself. On the other hand, he could simply reach the same result if the resentencing was not going to decrease the term --

Q Well, you wouldn't resentence him just in the 2255 proceeding, would you?

MR. REPPY: He would put on a new robe, I would understand -- I am not certain how it is done, but I would think that if the sentencing judge was gone and we were in the particular district and division, where he was sentenced --

Q I suppose you'd have to get up the -- I suppose you'd have to have --

MR. REPPY: -- and counsel would --

Q -- a sentencing hearing.

MR. REPPY: And counsel would be available.

Q Yes.

MR. REPPY: The Putt case lends itself to the point that no evidentiary hearing need be required in cases where the sentencing judge can state with assurance that he was

not affected, the procedure in the Putt case of the Fifth Circuit, and that perhaps this problem never would have arisen if Judge Harris had only, instead of denying that rehearing petition, made some findings, they could have been so conclusive on the point that Mr. Tucker would have had no basis for appeal.

Q Well, if he hadn't been of that opinion, how could he have denied the motion?

MR. REPPY: He could have misunderstood what Mr. Tucker was seeking. I would -- the papers are rather clear, it would seem, but the statement there is no new issue is wrong; and suggests perhaps a misunderstanding.

Now, on the --

Q It was labeled, you say, petition for rehearing?

MR. REPPY: Petition for rehearing.

Q Are you suggesting Judge Harris may have thought indeed it was addressed to the use of these on the issue of guilt rather than on the issue of sentence, even though --

MR. REPPY: If he had read it casually --

Q Well, is that what you're suggesting?

MR. REPPY: In all candor, though, Mr. Justice Brennan, it's a well-written petition for rehearing, and Judge Harris should not have mistaken it for what it was.

Q Well, on that, let's assume that he had just said petition for rehearing denied. How could he deny that without saying to himself, well, this wouldn't have made any difference

anyway.

MR. REPPY: I think that's procedural error in that we simply don't have a record for appeal, and it's simply a matter of the desirable procedure to cut down on the appeals that go on in collateral attack proceedings. It's best for this Court, and, as the Ninth Circuit seems to indicate it wants, to require the sentencing judge to take whatever time it takes, 20 minutes, to --

Q We don't require that out of judges passing on the voluntariness of the confession. The confession is in a -- if they say just denied, it's voluntary; we don't require any exposition, and the Townsend case says we will -- if a man gives a clear ruling, the kind of a ruling he's supposed to give, yes or no, you assume regularity of it.

MR. REPPY: But that may be so when it simply says denied; but here we have "raises no new issue", and yet on the face of it there is the potential for prejudice. It is possible that Judge Harris believed that Mr. Tucker was guilty of these three prior convictions and as to two of them, if he had not felt that it was "neither here nor there", if he had known of his right to collateral attack, he might have convinced the judge and received a lesser sentence.

Q This sentencing was back in 1953?

MR. REPPY: That's correct.

Q Judge Harris, that's George Harris?

MR. REPPY: Yes.

Q And he's still --

MR. REPPY: He's still there. We have checked.

Q Yes. And this was a 25-year sentence?

MR. REPPY: Yes, it was; the maximum.

Q Where is Mr. Tucker now? He won in the Court of Appeals, and --

MR. REPPY: He remains in federal prison in Washington, and although he states that he is entitled to release in 1972, Mr. Tuttle advises that he has checked with the Bureau of Prisons and that the mandatory release date appears to be 1973. So there is some uncertainty about that.

Q Hasn't he been released in light of the judgment of the Court of Appeals?

MR. REPPY: No, he has not been, as I understand it. I have been receiving mail from him from Steilacoom, Washington.

Q He's in prison on this same charge?

MR. REPPY: That is correct.

Q On the same conviction?

MR. REPPY: That is correct.

Q But he has -- oh, excuse me.

Q I have the Appendix in my hand, I'm looking at pages 24 and 25. What judge was presiding over the hearing when this examination on pages 24, 25 and 26 took place?

MR. REPPY: Judge Harris is the only District Judge

involved in this case at all proceedings: the trial, the sentencing, the 2255. It's the same judge throughout.

Q Do I understand your argument to be that he could not take into account the cumulative admissions and statements made as reflected in those three pages?

MR. REPPY: Not at all, Your Honor. Had there -- the two points I'm making are that he should have taken into account, under the proper context, if he knew that this man was speaking about these convictions under the belief that he was conclusively presumed guilty, he might have discounted it, because the fact that the man believes he is conclusively presumed guilty rather limits his explanation. As he cut himself off by saying "that's neither here nor there" when he started going into an explanation.

Q Well, I don't read this as any very truncated inquiry, I thought his explanations of his criminal conduct were very expansive. He could hardly have described more unless he gave an inventory of what he had stolen from the jewelry shop.

MR. REPPY: Well, Mr. Chief Justice, the man does not contest his guilt of the jewelry store robbery.

Q There were two jewelry store robberies.

MR. REPPY: The 1946 jewelry store robbery. He does -- and he never did admit at any point in the proceedings guilt of the 1954, the conviction; and, as Mr. Tuttle has noted,

Judge Harris has never ruled on its validity, although the validity question was before Judge Harris. And for that reason --

Q Is he still subject to imprisonment by California?

MR. REPPY: No, he is not. He is on parole on -- if he violates his parole, he is. He is on parole on a conviction of one set of robberies; as to the other set of robberies, the Appendix to respondent's brief indicates that the charges were dismissed, and they cannot be brought again because -- to my belief, because of the statute of limitations, in California.

Q And these were the California proceedings relating to conduct after the conduct for which he was -- for which he is now in prison?

MR. REPPY: I am not certain. I don't think the record indicates which bank robbery occurred at what point in time.

Q In any event, there --

MR. REPPY: One of them was federal -- excuse me.

Q In any event, they are the ones that Judge Harris said he wouldn't consider when he was --

MR. REPPY: It's --

Q -- during the trial or at sentencing.

MR. REPPY: It's extremely ambiguous, Mr. Justice

White, what Judge Harris said he would not consider. It's very clear that he was not going to consider the Los Angeles charges.

Q But he was convicted after sentencing here, he was convicted in the California courts?

MR. REPPY: Yes, he was.

Q And he's on probation -- he never served any time there, I take it?

MR. REPPY: I am not certain whether he was serving -- whether he was moved down to a California prison to serve the two federal and State sentences consecutively. I do know that the ones that he is not under parole about -- on which he's not on parole are those which are discussed in the Appendix to the brief.

I would like to allude briefly in argument to the point made in Part III of respondent's brief, and that is that Judge Harris in 1953, when he was sentencing petitioner, had no way to know that petitioner had previously spent 11 and a half years in prison wrongfully, because of unreliable convictions, convictions which were made without counsel. Perhaps the judge would have wanted -- to have shown some leniency. Now, we have his statement at the bottom of page 35 of the Appendix: "There is no room for the Court to entertain elements of great sympathy because" Mr. Tucker was using a gun, even though he didn't point it at anyone.

But there was some room, not for great sympathy, for some. And if there was only sympathy of a matter of two years or three, Mr. Tucker would now be -- have finished his sentence, it appears.

The Third Circuit cases, the District Court cases in the Third Circuit have developed a theory of relief given on 2255 in habeas corpus that it is only fair and just to return a sentence to the sentencing judge for reconsideration when it appears after sentencing that the man, the defendant has served time in prison on wrongful convictions. The thought is, I believe, to give a little mercy to make up for this wrong that has been done to him, which cannot be righted in any other way.

And certainly insofar as factors in retribution and deterrence of others, two of the four factors that are frequently considered at sentencing, so far as they are involved, there is room for mercy, because of the prior time in prison. And in Mr. Tucker's case, not only was he in prison, he was on a chain gang for five and a half years. And that that means, I do not know.

One other point in respect to the passage on page 24, Mr. Chief Justice, that is concerning you, is that Mr. Tucker, in 1953, may never have consulted with an attorney about his criminal responsibility for this 1938 robbery.

Now, on the basis of my correspondence with him, which

I am not going to go into because they are off the record, I think that he might have developed a duress defense, if he had had a chance to talk with an attorney about this. And while he admits, "I broke into it, I stole a car", it doesn't negate a possible defense that would limit the criminal responsibility and make him seem less evil in the eye, or less wicked in the eye of Judge Harris in 1953, when sentencing occurred.

Certainly some further explanation of what happened might have been proper. And also, Your Honor, in respect to the Florida conviction, the fact that he served seven and a half years, a very severe sentence, might have indicated to the sentencing judge that there was something terribly wrong. Wouldn't it to you, Your Honors? A ten-year sentence for a 17-year-old joy ride? Something terribly wrong seems to be there, a very vicious crime. Mr. Tucker may have felt that he could not explain, as we know, "he felt my guilt", "that's neither here nor there", and if for no other reason than to allow him now to give his chance to explain without feeling that he's precluded because of the conclusiveness of a conviction, the remand order is appropriate, and a procedure for the future that would be appropriate is to require or direct the lower courts in this type of case to go through the motions which do not take very long and which do not require an evidentiary hearing of explaining, as was done in Putt vs.

United States in the Fifth Circuit, of explaining why there is a denial. And this will permit appellate review and we will not have the speculation which the dissenting judge was bothered about in the Ninth Circuit.

Thank you.

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

You have five minutes more, Mr. Tuttle.

REBUTTAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.,

ON BEHALF OF THE PETITIONER

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

First, Mr. Chief Justice, you asked the citation of the Verdugo case which related to the use of evidence which had been seized in violation of the Fourth Amendment. That's a Ninth Circuit case, Your Honor. It's 402 Fed 2d 599.

With respect to petitioner's contention that at the sentencing hearing he protested innocence and he meant to say "both", that is to say both the 1938 Florida conviction for auto theft and the 1950 Florida conviction for armed robbery; as I read the record, and I have nothing outside the record to rely upon, it seems to me, Your Honors, that what he is saying with respect to the auto theft is that that was a joy ride, that wasn't grand larceny auto. I mean, "I did it but it wasn't a crime of that magnitude", and that's the sense of innocence which he is asserting.

Now, I'd like to address myself very briefly to

this notion of conclusiveness which Mr. Reppy has raised. There's an extensive portion of the respondent's brief addressed to the notion and to the rule of law that for certain purposes convictions are conclusive evidences of guilt. And that arises principally in impeachment proceedings where a person is often not allowed to explain that "although I was convicted, I wasn't in fact guilty". That only arises in context where rules of evidence apply, and I submit that in importing conclusiveness into sentencing, respondent commits the same error that he is attempting to do when he wants to import the rules of evidence into sentencing generally.

Whereas we would claim that the rules of evidence do not apply and any reliable information can be used, we would maintain the same with respect to any doctrine of conclusiveness.

I can't conceive of a probation officer, if a defendant being examined by him for the purpose of preparation of a presentence report says, "Yes, I had the X conviction and the Y conviction, but I didn't do it; I didn't have an attorney, or I didn't do it, or I was under duress". I think that all of the books which have been collected in respondent's brief and all of the learning that the Court may find on the subject of sentencing and the preparation of presentence reports indicates that these gentlemen, the probation officers, are trained to be open-minded and trained to include every-

thing, and I don't think the doctrine of conclusiveness would ever preclude a defendant in a presentence report from alleging his innocence or circumstances in mitigation. I simply feel that conclusiveness has no relevance in this case.

Q Of course this was back in 1953 when procedures may have been, and apparently were, a little different. All this oral report is something that is not very usual today.

MR. TUTTLE: That is correct. In this case it appears that the judge acquired his information orally.

I was addressing myself to the more general problem of whether conclusiveness would create any bar.

With respect to the matters that Judge Harris considered, I would like to address myself to that very briefly, because, Mr. Justice White, you raised a question about that. I think that if you read the record, it's clear that he did not rely upon the pending federal Los Angeles indictment, but that he did rely upon the seven or eight pending State investigations, four of which later, in fact, did result in convictions, and which were later collaterally attacked.

So I think that his -- the things that he didn't rely upon was the situation where there was an indictment and in the judge's eyes the indictment was going to take care of itself, that there would be a prosecution and an appropriate sentence. But as to those pending State proceedings, he felt that the State might prosecute or not prosecute, or prosecute

some and not others, depending on what happened at his sentencing. And I --

Q He doesn't have a California detainer on him at --

MR. TUTTLE: No, because he was successful in, first, attacking his habitual criminal finding, that went up to the California Supreme Court, and they said if uncounseled priors were used to make him a habitual criminal, you can't hold him a habitual --

Q All I want to know is, is he under a detainer or isn't he?

MR. TUTTLE: I'm sorry, I didn't mean to get onto a tangent, Mr. Justice White. He is not, as far as I know.

Q But did I understand that if he were released from federal prison today he would still be on probation from California?

MR. TUTTLE: I don't know the answer to that. That's what --

Q Mr. Reppy seemed to indicate that.

MR. TUTTLE: -- Mr. Reppy represented, yes.

Finally, I would simply repeat that it is quite clear to the government in this case that any problem about the reliance on these sentences or questions has been answered by the judge himself, when he said, when he denied the motion to reconsider sentence on the basis of the use of those priors. And I think no useful purpose could conceivably be

served by asking him to say it all over again.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Reppy, you served at the request of the Court and by our appointment. On behalf of the Court, I want to thank you for your assistance to the Court, and of course your assistance to the client that you represented.

MR. REPPY: Thank you very much.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:37 p.m., the case was submitted.]