In the

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN)
)
Petitioner,)
)
v.)
)
LEROY PAYNE,)
)
Respondent.)

No. 71-1005 Copy 2

Washington, D. C.
February 22, 1973

Pages 1 thru 59

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IN THE SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF MICHIGAN, Petitioner	:	No. 71-1005
v.	:	
LEROY PAYNE, Respondent.	:	

Washington, D. C.

Thursday, February 22, 1973

The above-entitled matter came on for argument at 11:40 o'clock a.m.

BEFORE:

WARRENM E. BURGER, Chief Justice of the United States
W O. DOUGLAS, Associate Justice
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 A. SMIETANKA, Chief Assistant Prosecuting Attorney, Berrien County, St. Joseph, Michigan, for the Petitioner.

JAMES R. NEUHARD, Michigan State Appellate Defender, 1310 Lafayette Building, 144 W. Lafayette, Detroit, Michigan 48226 for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will next hear argument in the case of Michigan against Payne, No. 71-1005.

Mr. Smietanka, you can proceed whenever you are ready.

ORAL ARGUMENT OF JOHN A. SMIETANKA ON BEHALF OF THE PETITIONER

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

The facts in this criminal case are a bit complex. Essentially they arise from an incident which occurred in Benton Harbor, Michigan, on November 5, 1962. Two police officers were riding in their patrol car, stopped a Pontiac automobile, got out of their automobile, and as they were walking up to the Pontiac, the driver and passenger of that vehicle jumped out and began firing at them, striking both officers, critically wounding both. Both did survive.

Later that day -- oh, incidentally, it might be noted at this point that after the officers had been hit, they did fire their guns at the retreating vehicle Pontiac.

Later that day, Leroy Payne, the defendant in this case, was arrested. A confession was obtained from him illegally. And before Judge Philip Hadsell, Berrien County Circuit Court, he pled guilty on December 14, 1962.

In February of 1963 he gave testimony against his co-

defendant, Lionel Bradford.

On March 8, 1963, he was sentenced to 19 to 40 years by Judge Hadsell.

QUESTION: Before we get past that, when he gave the testimony against his co-defendant, did he acknowledge all the facts that you have recited?

MR. SMIETANKA: He did.

QUESTION: Was that testimony used against him in any way thereafter?

MR. SMIETANKA: It was not.

Subsequently, in 1967, Mr. Payne appealed to the Michigan Court of Appeals and on May 12 of that year, 1967, the remand order was entered by that court to the Berrien County Circuit Court for an Evidentiary Hearing on the question of voluntariness of his confession and voluntariness of his plea.

Then Circuit Judge Chester Byrns conducted that Evidentiary Hearing in 1967, suppressed the confession, vacated the plea, and set the case down for preliminary examination whereupon it proceeded normally to trial.

Prior to trial, the same Circuit Judge, upon motion of the defendant, granted change of venue to Grand Rapids, which is Kent County, Michigan.

At the trial, certain evidence was entered by the people and by the defense. I will get to that evidence later

in my argument, if it please the Court. He was convicted by a jury selected from Kent County. He was sentenced on August 30, 1967, to a term of 25 to 50 years.

QUESTION: Now at this trial was his testimony against Bradford admitted (inaudible.)

MR. SMIETANKA: It was not, your Honor.

QUESTION: Did some rule or law of Michigan prohibit that?

MR. SMIETANKA: The confession was not entered because Judge Byrns specifically suppressed it.

QUESTION: The confession. I'm referring to his affirmative testimony on the record in open court in Bradford's trial.

MR. SMIETANKA: No mention was to be made of any -- there was an agreement prior to trial, it is my understanding, an order of the court that no mention was to be made either of his confession or his plea or the testimony before Judge Hadsell in the bradford trial, and none was made. In fact, there was a great deal of cross-examination in the second trial which led up to but did not even in the remotest sense mention the fact he had testified in the prior trial or of any prior proceedings. There was no notification, no notice of any prior proceedings given to the jury or anything that had happened in those prior proceedings.

QUESTION: This was by virtue of an agreement, not by

law.

MR. SMIETANKA: By virtue of an order of the court, I recall.

QUESTION: An order of the court?

MR. SMIETANKA: I'm not sure how exactly the order was formulated, whether it was by stipulation of counsel, which I believe was the case, and the court made an order based on that understanding. It may have been done in chambers and it may not have been formally filed, but that was the case.

QUESTION: Neither the jury nor the judge in this trial you are speaking of now were aware of testimony which amounted to a judicial confession in the Bradford case?

MR. SMIETANKA: The judge was, your Honor, because he was the one who had vacated the prior conviction.

QUESTION: Oh.

MR. SMIETANKA: He was, as I said, sentenced to 25 to 50 years in the Michigan Department of Corrections.

He did appeal that conviction, raising as one of the grounds an excessive sentence the second time around.

On June 23, 1969, this Court delivered the decision in North Carolina v. Pearce. Two days later, June 25, 1969, the Michigan Court of Appeals affirmed both the conviction and the sentence, that is, the sentence of Judge Byrns. The Michiga Supreme Court granted leave and apparently unanimously affirmed the conviction, but in a 4 to 3 decision reversed the sentence

based on their interpretation, the Michigan Supreme Court's interpretation, of the requirements of North Carolina v. Pearce. This Court granted certiorari on October 16, 1972.

The primary issue which is actually the last issue that I raised in my brief is that of the retroactivity of North Carolina v. Pearce. First of all, I think we can agree that the sentence was properly imposed technically, it was well within the statutory maximum, that is, the statutory maximum in Michigan for assault with intent to murder is life imprisonment.

There are two issues dealt with by the Court in North Carolina v. Pearce. First is that of credit to be given to a person who has appealed a conviction and been resentenced. He must be given credit. This was posited and based on the Ex parte Lange and the double jeopardy clause.

But the second issue --

QUESTION: That issue is not here.

MR. SMIETANKA: That issue is not here, your Honor. No question of that.

The second issue is that of whether or not a higher sentence can be imposed on the second sentence after an appeal, successful appeal. The Court in Pearce, of course, specifically eliminated the question of double jeopardy and equal protection clauses as being a bar to that sentence, that increased sentence, but did say that due process requires that these

sentences be protected or be governed by certain rules, a certain rule, namely, that first of all it be based on objective identifiable conduct occurring after the first sentence, and secondly, that the conduct must appear on the record.

On January 16 of this year, this Court delivered an opinion in the case of Robinson v. Neil in which it cited Pearce without mentioning exactly the -- specifically defining how it was cited, but it did note that Pearce indicated that Benton v. Maryland should be applied retroactively.

The mentioning of North Carolina v. Pearce, we feel, by Mr. Justice Rehnquist was intended to deal with the double jeopardy aspect of Pearce, that is, the credit for time served.

Further in that decision in Robinson this Court noted that there is some conflict or difficulty of understanding the retroactivity and prospectivity rulings of this Court and referred the readers in the case of Desist v. United States as summarized in the Linkletter type criteria and said that first of all we must look to determine whether or not the Linkletter criteria apply to the question of what right are we dealing with, what right or what privilege newly defined are we dealing with? Then we must look to the purpose of the rule. Desist also emphasized the fact that the purpose of the rule newly defined is the most important aspect.

Looking at the particular right that we have, that is the 14th Amendment due process clause, this Court has not held

it in and of itself solely by citing and by having a right affected by the due process clause does not in and of itself require retroactivity. A particular rule or the purpose to be served by a particular rule may indicate that retroactivity should take place, but it does not require it.

It is the contention of the State of Michigan that Linkletter criteria should be applied here for the following reasons. First of all, that, as I said, the due process clause does not in and of itself require retroactivity as would, as Mr. Justice Rehnquist noted, as it would with the double jeopardy clause in Waller v. Florida. Essentially the due process clause and the weight as applied in this case assures fairness, basic, simple fairness in the imposition of a second sentence.

We then move to the purpose of the rule. Essentially there are two purposes for the North Carolina v. Pearce decision. There are two things that the Court wanted to protect. First of all, that is the appellate process. That is, there should not be any unreasonable impediment to the exercise of a right to appeal granted in this case by a State. The Court, as I recall, has not stated that there is a constitutional right to appeal, but when it is applied, it must be applied -- there must be equal access to the court, there must be no unreasonable distinctions. And the unreasonable distinction here is the reasonable fear that a second sentencing judge will act vindictively against a particular defendant for having

appealed.

The second purpose is to prevent, to deter improper vindictive sentences upon defendants solely because they have appealed and want a new trial.

Now, how do we apply the Pearce case and how does it fit within this question of retroactivity?

QUESTION: First of all, was it the same judge in both trials?

MR. SMIETANKA: No, sir. No. Judge Philip Hadsell imposed the first sentence, your Honor.

QUESTION: Right.

MR. SMIETANKA: And Judge Chester Byrns imposed the second.

QUESTION: That's what I thought.

MR. SMIETANKA: There are certain factors --

QUESTION: It was Judge Byrns who in fact had set aside the original judgment and granted a new trial.

MR. SMIETANKA: That is correct, your Honor.

QUESTION: He wasn't an appellate judge, he was --

MR. SMIETANKA: No. The case was remanded in the Michigan Court of Appeals for an Evidentiary Hearing. And at that Evidentiary Hearing, or after it, he decided first that the confession should be suppressed, the plea vacated, and it was set for a new preliminary examination which was held and proceeded to trial.

QUESTION: The essence of that is that it allowed him to withdraw his guilty plea.

MR. SMIETANKA: That is correct.

QUESTION: The thrust of that holding.

MR. SMIETANKA: That is correct.

The second thing which we are trying to prevent, or the Court is trying to prevent in Pearce is the vindictive sentencing. How do we go about handling it? First of all, the Court said that the type of material, the factors to be considered by a judge imposing a second sentence should be limited to objective identifiable conduct occurring after the first sentence. Actually it didn't say "limited to;" it said "based upon." And, secondly, there is a record-making requirement. That is, this material must be placed on the record so that a higher court can review the bases for sufficiency.

Now, retroactivity, it's our contention, will not further either of these goals. First of all, those who have been in the past deterred from appealing are not going to have their wrongs righted by the retroactivity of Pearce to those cases where those who did appeal had a higher sentence imposed. That is, the actual wrong that the Court is dealing with is the deterrence of those who want to appeal but are afraid to appeal. These are the people who have suffered the appellate wrong that Pearce is trying to avoid.

Now, making these cases retroactive, making this case

retroactive to handle those where the defendant did appeal, obviously those who were afraid will never have justice done to them.

Secondly, the prospective application of Pearce will satisfy this appellate end of Pearce. That is, from now on we know, we convicted of crimes, we know that we will not be subject to a vindictive sentence the second time around and we now can prosecute our appeal.

It should also be noted that if Pearce were to be retroactively applied, it would have to be logically a question of each person who is sentenced would then have a right to come in and say, "Well, I was deterred because of the fear of unreasonable increase in sentence and, therefore, hear my appeal," thus reopening, or opening for the first time, each sentence at least and each conviction that has ever taken place in which the defendant presumably is still alive. Thus, the proof problems would be immense.

QUESTION: Do you have any figures as to how many people convicted, successful on appeal, had their sentences enhanced?

MR. SMIETANKA: I have no figures, your Honor, except for figures which were cited in the appendix to Walsh v. Commonwealth, dealing there not with the type of review we have here, the type of sentence we have here, but appellate review of sentencing. This came about under the Massachusetts rule.

And in that there are many, many statistics.

QUESTION: I am talking about this big flood you are talking about. I don't know how big this flood is.

MR. SMIETANKA: Well, the flood, your Honor, would come from every single conviction.

QUESTION: Every conviction.

MR. SMIETANKA: If a person could conceivably -- for example, a person is convicted, a hundred people are convicted --

QUESTION: Are there few people in penetentiaries today who were convicted who didn't appeal at all?

MR. SMIETANKA: I don't know how many there are.

QUESTION: Well, there are some.

MR. SMIETANKA: There are some.

QUESTION: Well, they wouldn't be affected.

MR. SMIETANKA: I think they would, your Honor, because the appellate purpose of Pearce is to avoid the fear of a higher sentence. If a person in jail, in prison, does not appeal, it may be for other reasons. For example, he might be satisfied with his conviction, satisfied that justice was done, but one --

QUESTION: I'm only quarreling with your word "all," and I still say that a man in a penetentiary serving life imprisonment wouldn't be worried about enhancement of his sentence. Am I right or wrong?

MR. SMIETANKA: That could be. All right.

Furthermore, the sentencing process is to be protected by Pearce and there the real evil is a question of actual vindictiveness. Now, that is actual vindictiveness for having taken an appeal. And the way the Court handled that was to formulate a rule of basically constructive vindictiveness. The Court said, all right, if these criteria which we are laying down are not met, then in effect we are construing, we are saying, that this sentence is reversible because it is technicall it is based on a vindictive type of sentencing, it is constructive vindictiveness. But we are actually trying to avoid actual vindictiveness and, like actual police misconduct, the type of conduct we had in Mapp v. Ohio? We are talking here about deterrence of that behavior. And retroactive application of Pearce is not going to enhance the deterrent effect of Pearce.

MR. CHIEF JUSTICE BURGER: After lunch we will return to your argument. I hope you are saving a substantial amount of that time to emphasize the differences in the situation when the second sentence was imposed as compared with the first.

MR. SMIETANKA: I will.

(Whereupon, at 12:00 o'clock noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue. You have about 10 minutes altogether.

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

May it please the Court, the questions that I was requested to confine my remarks to were what type of behavior was indicated as --

QUESTION: Well, it is a matter of very great interest to me.

MR. SMIETANKA: Yes, it is. But primarily I would like to deal with the two items. There are two affidavits in the Petitioner's appendix found on pages 17 through 21. These are from Judge Byrns. One was supplied at the request of the Michigan Supreme Court; the other he submitted to clarify one matter in this Court.

Basically they can be boiled down to two things. First of all, he felt that the behavior of Mr. Payne at the trial warranted an increase in sentence, namely, after receiving a new trial, he came in and the judge concluded and we believe the jury must have concluded he did not tell the truth because, for the following reasons: The evidence presented by the people was as follows:

First of all, Vic Yost, the victim, made an in-court identification of the defendant as the one who shot him. He had

known him before and saw him, recognized him when the shots were being fired, and testified that way in court. Furthermore, when he was laying in the street and the first officers came up to the scene, they asked him, "Who shot you?" And it was testified that Vic said, "Leroy Payne." He gave the license number of the car, RB 2599. That car when it drove away had been fired at by the officers, the retiring vehicle. They found the car later, same license number, four bullet holes in the trunk of the car, and that car was Leroy Payne's.

Next, the assault weapon was found and Leroy Payne's fingerprint was found on it.

Against this, defendant testified to an alibi, namely, "I was at home during the time -- at all times. I was home in bed at the time the shooting took place. I did not shoot Vic Yost, I did not drive my car that night." The jury in finding the man guilty beyond a reasonable doubt must have found that the testimony of Mr. Payne was untrue. In many cases, in insanity defenses and many other types of defenses, this is not the case. But when there is an alibi defense, and especially in this case where it is so clearly -- the positions of the two parties are so clearly defined, the verdict of the jury was that he was guilty beyond a reasonable doubt and must have included a fact-finding that he did not tell the truth at trial.

QUESTION: Now, the important thing, perhaps, or one

of the important things is the impact of this as compared with the posture of the case when it was before the original sentencing judge. At that time it was a different judge, was it?

MR. SMIETANKA: That's correct.

QUESTION: That judge had the impression, somewhere I get it out of the record, that since he fully confessed and expressed regret and sorrow for the shooting of these officers, that he was a reasonable candidate for rehabilitation. And did not the second judge give some indication he thought this was very much in marked contrast?

MR. SMIETANKA: Yes, your Honor, that was my second point. Taking this type of behavior at the second trial together with the completely different approach that Mr. Payne took at the first trial. You will notice in the appendix on pages 6 through 8 the sentencing transcript of Judge Hadsell. He specifically notes the approach this defendant had taken confessing his crime made him an apt candidate for rehabilitation.

QUESTION: Is it the State's position that a State may impose a heavier sentence in any case where someone does not plead guilty but is convicted?

MR. SMIETANKA: No. No, that's not the case, your Honor.

QUESTION: What else is there here? The man maintained

his innocence in the second trial after having confessed it in the first one, that's true.

MR. SMIETANKA: Yes.

QUESTION: But you're saying the heavier sentence was justified by his behavior, namely, in denying the crime and maintaining his innocence?

MR. SMIETANKA: There is a difference, your Honor, we believe between maintaining a person's innocence. That is a legal conclusion. Because I can say I'm innocent, but not come in and testify to facts which are specific --

QUESTION: So you do say then if a man gets up on the stand and denies that he shot the weapon, that he shot the gun, and then the jury finds him guilty, that the State is justified in imposing a heavier sentence on him than his co-defendant who pleaded guilty?

MR. SMIETANKA: If the case -- we are not dealing with a co-defendant, your Honor.

QUESTION: I know, but you would say that I suppose.

MR. SMIETANKA: No, because I'm dealing with a question of the same person. We are dealing with the same person at one time in 1963 having one attitude.

QUESTION: Well, if he loses his gamble and the jury finds him innocent, you're entitled to punish him more heavily than if he had pleaded guilty?

MR. SMIETANKA: For the behavior which he has exhibited

after that first sentence, yes, your Honor.

QUESTION: What's the sense -- this man pleaded guilty and was convicted, and he appealed. Was the purpose of the appeal so he could go back and plead guilty again?

MR. SMIETANKA: No, the purpose was not that he go back and plead guilty again. It was to have a fair trial which he received. In the course of that trial, he exhibited conduct which we contend is detrimental conduct, that is, testifying falsely. We believe that this Court --

QUESTION: How do you know it was falsely?

MR. SMIETANKA: Your Honor, the determination --

QUESTION: Well, do you have perjury in Michigan?

MR. SMIETANKA: Yes, we do. We did not charge him with perjury because of the --

QUESTION: All you can say was the jury didn't agree with it. Can you say any more than that?

MR. SMIETANKA: The case --

QUESTION: The jury agreed with the State and did not agree with the defendant.

MR. SMIETANKA: That's correct.

QUESTION: That's all.

MR. SMIETANKA: But in finding that they agree with the State, they have to completely disregard the testimony of the defendant in this case.

QUESTION: Well, how else can you get a conviction?

MR. SMIETANKA: Well --

QUESTION: If you agree on one side, you vote that way. If you believe the other side, you vote that way.

MR. SMIETANKA: That's correct, your Honor. However --

QUESTION: Is that this case? What makes this so different from the run of the mill criminal case?

QUESTION: Is it the essence of the verdict in the second trial cannot be read any other way than a finding that he testified falsely under oath and that they reached that finding beyond a reasonable doubt? But is that as important, really, as the fact that the judge said in sentencing after the trial that this man was a different person in terms of his probability of rehabilitation and that that was the basis for his giving the heavier sentence?

MR. SMIETANKA: Yes, sir. And all the testimony has to do is to lead to that conclusion, basically the sentence is --

QUESTION: What is it that is so different?

MR. SMIETANKA: The difference, I believe, your Honor --

QUESTION: One time he says, I did it, I shot him, and I'm sorry, which he has a perfect right to do. And then he gets a new trial. He says, I didn't shoot him. Is that horrible?

MR. SMIETANKA: Your Honor --

QUESTION: Is that enough to increase a sentence on him?

MR. SMIETANKA: I believe, your Honor, it is conduct

which would indicate something about his character which the judge could take into consideration in imposing a higher sentence, yes.

QUESTION: Well, what did the judge say in the consideration except that he didn't believe him.

MR. SMIETANKA: He took into consideration that the jury found he was not telling the truth, and this indicated something about his character, a change in his character which had to do with the length of sentence which had been imposed.

QUESTION: A change in his character that he wasn't bowing down and scraping, is that it?

MR. SMIETANKA: That is not what is required.

QUESTION: What else is there other than that?

QUESTION: I take it you have already explained at some length what you think is different, haven't you?

MR. SMIETANKA: Yes, your Honor.

QUESTION: Did he not once but twice make a full confession? When he testified in, was it Bradford's trial?

MR. SMIETANKA: Yes, sir.

QUESTION: When he testified in Bradford's trial, leading to the conviction of his co-defendant, he fully described in every detail his participation in the crime. None of this information, of course, could have been known to the judge who sentenced him on the guilty plea in the first instance.

MR. SMIETANKA: No. In the first case, your Honor, the facts are slightly different. That is something that the Michigan Supreme Court did not notice, and that was that Judge Hadsell had presided at the trial of Bradford before he sentenced Payne. So he heard Payne testifying. We don't dispute that. He was aware of the facts of Bradford in Payne at the Payne sentence.

QUESTION: Did he also take into consideration the fact that he testified for the State to convict the other man?

MR. SMIETANKA: He may have. I don't know. He didn't so state that.

QUESTION: Well, I don't know that he took it into consideration at all, do I?

MR. SMIETANKA: You don't, your Honor.

QUESTION: He only took one side into consideration.

MR. SMIETANKA: That's correct.

Your Honor, I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Neuhard.

ORAL ARGUMENT OF JAMES R. NEUHARD ON

BEHALF OF THE RESPONDENT

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

I would like to step into the conduct area of the argument at this time. However, I feel there are a few

responsive notes I would like to make on the issue of retroactivity.

I agree with the prosecutor when he states this is a very complex problem. This case has been in the courts now for over ten years on various aspects. In fact, there is a collateral matter currently pending in the Sixth Circuit which is the companion case to this case, the co-defendant Lionel Bradford case is on appeal in the Sixth Circuit, again by the people, because Lionel Bradford's conviction was vacated by the District Court in the Eastern District of Michigan. The basis for the vacation was that Leroy Payne's testimony was used to convict Lionel Bradford, and Judge Kennedy in vacating the conviction held that because his confession was brutally beaten out of him, it was as though the State knowingly used perjured testimony to obtain a conviction of Bradford.

This would also get into the conduct argument, but --

QUESTION: (Inaudible) effect when he testified against Bradford?

MR. NEUHARD: That's correct, your Honor. The reason --

QUESTION: How long a time was that?

MR. NEUHARD: Pardon?

QUESTION: How long a time was that between the two trials?

MR. NEUHARD: Almost a period now of 10 years.

QUESTION: Yes. There is some spillover effect of the

original confession when the man is in open court, in the presence of a judge.

MR. NEUHARD: That's correct, your Honor, in this particular case, because of the unusual fact situation. The answer to that basically is that when Leroy Payne was picked up by the police officers, he was in custody of three various police departments, and there is no dispute that the reason for vacating his guilty plea in this particular case was because the confession was beaten out of him. As a matter of fact, at Lionel Bradford's trial they wanted to introduce pictures taken of Leroy Payne after his confession and they were excluded because they were inflammatory, that he was in such a brutally beaten condition, his thumbs were sprained, his face was swollen, his genitals squeezed, until he was brought into a state where he confessed. All of the activities from the moment he was picked up until he testified in Lionel Bradford's trial and was sentenced were while he was in the custody of the police department, a space of five months, four and a half months. And because of that fact, when he finally did testify at Lionel Bradford's trial and he did go to sentencing, he initially intended to sue the police department for the condition in which -- the manner in which they treated him, and he decided not to do so.

QUESTION: What was the holding when they set aside Bradford's conviction?

MR. NEUHARD: Because the confession that was introduced the testimony of Lionel Bradford --

QUESTION: Who's confession?

MR. NEUHARD: This is Leroy Payne's.

QUESTION: Was introduced --

MR. NEUHARD: In Lionel Bradford's trial. That is, he took the stand and testified. It was his testimony.

QUESTION: His testimony.

MR. NEUHARD: His testimony, that's correct, your Honor.

QUESTION: Not a confession.

MR. NEUHARD: That's correct, your Honor.

QUESTION: That was the fruit of these beatings?

MR. NEUHARD: That's correct, your Honor.

QUESTION: That's the holding of the District Court?

MR. NEUHARD: That's correct, your Honor.

QUESTION: That's now on appeal in the --

MR. NEUHARD: The people are appealing that case in the Sixth Circuit. Our appendix in this particular case has extensive quotations from the Bradford transcript that show the manner of testimony of Leroy Payne plus all the testimony of the police officers, both at Payne's second trial -- or his first trial as it was after his plea, and Lionel Bradford's trial, and it is set out at length for purposes of comparison to show that Judge Hadsell knew as much as the second sentencing

judge, Judge Byrns, when he sentenced him. As a matter of fact, at the second sentencing, Judge Byrns said -- I'm sorry. At the first sentencing Judge Hadsell said that when he gave him 19 to 40 years in prison, that "I'm taking into account your ramorseful condition now, and if it continues, you might get released early." Because Michigan has indeterminate sentencing, it takes into account these vagaries of personality changes which can occur. And Judge Hadsell was well aware of this. He was well aware of what Payne had said at the first trial, and he was grateful that Payne had decided not to sue the police officers, which he has not done.

If I may, I would like to get into --

QUESTION: He did plead guilty.

MR. NEUHARD: That's correct, your Honor. The reason for the vacation of the guilty plea was because it was beaten out of him.

QUESTION: I understand that. I understand that. But this sentence followed the guilty plea.

MR. NEUHARD: That's correct, your Honor, the first sentencing. It also followed Lionel Bradford's trial.

QUESTION: Which is an admission that he performed the acts with which he was charged.

MR. NEUHARD: That's correct, your Honor. The same as a confession which is beaten out of you is an admission.

QUESTION: Yes, I understand that.

QUESTION: Was there any contention that the guilty plea was beaten out of him?

MR. NEUHARD: Yes, your Honor, in that the guilty plea is a product of the coercion of the Barrien County police officers.

QUESTION: Well, but what I asked you, was there any contention that the guilty plea itself was beaten out of him?

MR. NEUHARD: You mean while he was in court was he being coerced at that particular time?

QUESTION: Well, I think --

MR. NEUHARD: The implication is that --

QUESTION: I didn't ask you for the implication. Did you contend that the plea itself was beaten out of him?

MR. NEUHARD: Directly, your Honor, I have no knowledge on that point whether Mr. Payne could contend that --

QUESTION: What did the judge hold when he set aside the case?

MR. NEUHARD: That it was the product of a coerced confession and that it directly led to the guilty plea.

QUESTION: That had nothing to do with whether or not he did or did not say he performed the acts or the relevance of the fact that he said he performed the act to what sentence he might get.

MR. NEUHARD: I'm not sure I understand.

QUESTION: Which is completely different from the

second case where he pleaded not guilty.

MR. NEUHARD: Well, in the sense that after the first convictions and the --

QUESTION: Setting aside the plea as the product of a coerced confession, has very little relevance, if any, to the accuracy of the plea.

MR. NEUHARD: I think it has some direct bearing on whether or not a man would plead guilty knowing that he had --

QUESTION: That may be. That isn't what I said. I said it had very little relevance to the accuracy of the plea in the sense that it would have been set aside whether it was accurate or not.

MR. NEUHARD: That's correct, your Honor. That's correct. It may in the abstract or it may not have been a true plea, although Mr. Rayne, once he was out of the custody of the Berrien County police officers did begin the appellate process and when he came back to trial, he testified that he had nothing to do with it.

QUESTION: How long after the original plea of guilty and sentencing did he move for a new trial -- well, move to withdraw his plea of guilty?

MR. NEUHARD: Well, there was the initial four months. I would say about 3 months after he pled guilty until the Bradford trial. And then it would be a period of about two years, I would imagine before the first motion for a new trial

was made, and that was in front of Judge Hadsell. Following that there was a new motion for new trial in front of Judge Byrns at which Judge Byrns, the second sentencing judge, granted it. In between those two motions for new trial, there was the appeal to the Court of Appeals for the remand for an Evidentiary Hearing for determination of the circumstances under which the plea was made. So it would be --

QUESTION: Did, in the recent Bradford proceeding, Judge Kennedy make any finding that the story Payne told at Bradford's trial was coerced out of him and was not true in fact?

MR. NEUHARD: Well, she didn't go so far as to say it was not true in fact. She did say it was the product of coercion of the worst circumstances and should not have been injected into the trial by the people, knowing these facts to be true.

If I may, there are a few points I would like to make on the issue of retroactivity. We feel our brief is adequate on this point, but there are several points that should be brought out, that this issue was pending on appeal when the Pearce decision was released. It was based on prior Michigan authority. The case in the Michigan Court of Appeals when it was released two days subsequent to the release of Pearce took into account peripherally the Pearce decision, but the majority was a 2-to-1 decision, but because the second

sentencing judge knew more about the defendant than the first judge because he had taken the plea that affirmed the conviction. Prior Michigan law says very much like Pearce that if the situation is such that the sentence might have been the product of vindictiveness and no reason can be put forth for the sentence increase, then the sentence should be set aside.

QUESTION: What year was this sentence, the first sentence set aside?

MR. NEUHARD: The first sentence, your Honor, or first conviction?

QUESTION: His first conviction?

MR. NEUHARD: His first conviction was set aside, I believe it would have been, in 1967, I believe. 1967. And the -

QUESTION: Are they still setting -- is there still a procedure in Michigan to set aside guilty pleas based on allegedly coerced confessions?

MR. NEUHARD: Well, there is, your Honor. It's the basic procedure we have for challenging the validity of a guilty plea itself.

QUESTION: You may appeal -- after a guilty plea, you may appeal the admissibility, say, of illegally seized evidence.

MR. NEUHARD: Well, you can, your Honor. You can appeal anything you want in challenging the voluntariness of a confession itself, because Michigan has a statute since 1875 --

QUESTION: But you don't have a system as in New York

where if you make a motion to suppress certain evidence and it's denied, you can plead guilty and then appeal the .. of your suppression motion?

MR. NEUHARD: Your Honor, it's sort of -- yes, you can do it, but there is no set-up procedure to do that specifica l

QUESTION: In any event, in your case what happened was that the guilty plea was claimed to be express? product.

MR. NEUHARD: That's correct, your Honor.

Likewise, that's the contention that the defendant made in Leionel Bradford, that his testimony at the trial was a direct product of the coercion he was under during the time he was in the custody of the Berrien County police officers.

QUESTION: Does Michigan have any statute allowing some particular time limitation on withdrawing a guilty plea after sentence?

MR. NEUHARD: No, your Honor. This is an area of high dispute in Michigan right now. There is some authority for the proposition that between the time of the plea and before sentencing, that the defendant has almost a right to withdraw the plea, but he has to set forth good reasons. And after the plea, then the burden is on the defendant to show why the plea itself was invalid.

QUESTION: You mean after sentence?

MR. NEUHARD: That's correct, your Honor. Because that time period between the plea and the sentence where he has

more of a right to withdraw it than after the sentence. After sentencing in Michigan there is a very definite date by which it is the normal appellate process for showing that the plea itself was invalid.

QUESTION: On the reasons given, is it required that he assert innocence of the crime?

MR. NEUHARD: Not in the State of Michigan, your Honor.

I would like to get to the issue, if I may --

QUESTION: In view of the sense of conduct, that wouldn't have been a barrier to him, because he did then --

MR. NEUHARD: That's correct, your Honor, he did assert innocence when he got back to trial.

On that point, I think the underlying premises and difficulties of this particular case is that you have two unique elements in this particular case. You have a plea trial situation, and you also have a situation where a man vacates a plea, goes to trial, takes the stand and testifies in his own defense. Both of these were the main product which Judge Byrns used in increasing his sentence.

We contend that the first issue, that is, that he knew more about the defendant than the first judge in the manner of the crime itself is not factually true, not factually correct. Judge Hadsell knew as much about it if not more because both police officers testified at Bradford's trial -- he

knew more about the crime when he sentenced Payne, and in fact he said that at the sentencing itself, "I know all there is to know about this particular case when I invoke this sentence,"--than the second judge did, Judge Byrns.

It also leads up to the question of remorse and the question of perjury.

QUESTION: Would your position be different if he hadn't tried Bradford?

MR. NEUHARD: No, your Honor, it would not. It would not. We do not see any reason whatsoever in increasing a man's sentence from 19 to 40 years to 25 to 50 years that the State has put forth as a valid reason for doing so. Michigan has indeterminate sentencing which takes into account all the vagaries of personality and character differences when they have the man in the prison itself. They have a psychiatric department at the prison to take these things into account.

Also, on the subsequent conduct --

QUESTION: Absent a Bradford type trial, the second judge very likely might know more about the defendant if he is tried than a judge who just took a plea of guilty.

MR. NEUHARD: In Michigan also we have --

QUESTION: That isn't the kind of information that Pearce seems to contemplate.

MR. NEUHARD: No, it isn't. We contend it's not conduct occurring, first of all, after the first sentence. It's

nothing over which the defendant has any control.

QUESTION: But it may be information that the first judge didn't have.

MR. NEUHARD: There may in fact be a situation where the judge doesn't have the same information the second judge has. But we contend it's just not the kind of information that Pearce contemplated. Michigan has a presentence report procedure whereby a probation officer investigates a total crime and then reports to the judge for purposes of sentencing. It's a very exact kind of thing and goes beyond even analyzing the crime. He goes out to the neighborhood and talks to the neighbors of the particular defendant, any kinds of information.

QUESTION: With reference to that, in Judge Byrns' second affidavit he says that he did receive and study prior to sentencing Mr. Payne a supplemental presentence report which he cannot under the present Michigan law make public but which a higher court than this one can order produced.

Was that ever called for?

MR. NEUHARD: Yes, your Honor. As soon as we -- we did not get into this case until November 29th of last year. And as soon as we entered the case we made a motion for production of that presentence report. We also included in the appendix to our brief the ruling Judge Byrns made on our motion for production of that report. He denied us access to it. And we also quoted him two cases in Michigan

now that have been on the books for over two years which allow the sentencing judge to release it. It's within his discretion. It's not mandatory that it be released, but he has the right to release it. He denied us access to that. So that puts Mr. Payne in the position of challenging information that he has no way of knowing what is in there. It's a very difficult procedure at best to put a defendant in when he is contemplating an appeal. He has no control over the --

QUESTION: Wasn't there that issue in Williams v. New York?

MR. NEUHARD: Well, we agree with the basic premise of Williams v. New York, that the judge should know as much about the individual as he possibly can when he sentences him. But what we are talking about here is a second sentencing when you have other constitutional rights which are at stake. It's the constitutional rights not only of the defendant I should make clear, but of the court system itself, that there is a very good chance if Mr. Payne knew his sentence was going to be increased, he might not ever have appealed. And the kind of activity that went on in this case, with his confessions and the plea as a product of the confessions were beaten out of him would never be apparent to a supervising court. We have in Michigan one court of justice, and it's their duty to supervise the lower courts. And if they are prevented,this road of access to show the appellate courts what

is going on in the lower courts is denied, then you really are perverting the system of justice that our State has established. And we can't see the presentence reports.

QUESTION: You're emphasizing the fact,the circumstances of this first confession right after the commission of the crime, after Payne was taken into custody, but we can't avoid looking, can we, at the record which shows the police officer identified Payne by sight and that the bullet holes were found in the back of his car and that the pistol, Payne's pistol, was found to be the pistol that had been used to shoot the officers? Are those factors not all part of the whole mosaic here?

MR. NEUHARD: Yes, they are, your Honor, and they are necessarily so in many criminal convictions where the defendant does take the stand and asserts his explanation of the charges against him. And we contend that's what the charge of perjury is to take into account. And what you are allowing here, after a man has appealed, a man exercises his right to appeal, is that if he comes back into court, they are going to allow to increase his sentence on perjury 7 years, 7 years he had already served. He can now have his sentence increased by 7 years because of alleged perjury without any kind of hearing, without ability to see the presentence report upon which allegedly this sentence --

QUESTION: Are you suggesting that the judge in the trial, the judge whose sentence is under consideration now, was not entitled to conclude that this man was a less probable

prospect for successful rehabilitation than the first sentencing judge had concluded when he had expressed sorrow over his conduct?

MR. NEUHARD: There are many answers I can give to that, your Honor. But one of the primary answers, I think, that's important to recognize is that this man had a 19 year minimum at this time to 40 years in prison, that most reports done on prisons, including the President's Report on Crime and Correction, indicate that sentencing is not an exact science at all. And this kind of --

QUESTION: That does not constitute the question I just put to you.

MR. NEUHARD: Because what you are allowing, because of this idea that because one judge -- the impact it has on one judge is different from the impact it has on the second judge, necessarily, his candidate for rehabilitation,allows him to increase the sentence. That's 7 years. And the impact on this is that a man is now serving in prison.

QUESTION: Don't you think his conduct in the meantime is something the judge may take into account?

MR. NEUHARD: I do, your Honor. And this man, the judge said at the second sentencing that his conduct in prison was exemplary and that's the only thing that prevented him --

QUESTION: I'm not talking about his conduct in

prison. I'm talking about his conduct outside the prison.

MR. NEUHARD: Well, if it's conduct outside the prison as we are into the case, the only conduct which has occurred after the first sentencing was this alleged perjury that occurred inside the second trial. Now, the judge never in any of his affidavits alleged that the perjury occurred inside the second trial. He was referring to between the first instance, those pretrial -- in the first instance and the second trial that the allegation that there was internal perjury which occurred is because he asserted alibi defense. His alibi defense was that his car was stolen, his gun was in the car, and it was used unbeknownst to him.

Now, if there is an allegation of perjury here, I think this Court said many years ago in In re Murchinson which dealt with a grand jury proceeding that a judge can't be at one time the prosecutor, the judge, and the sentencer in a given case.

QUESTION: Let's assume that at the sentencing after the second trial there is no, the defendant doesn't say anything but that, "I'm innocent," and maintains his innocence. Are you suggesting that invariably that's an invalid factor for a judge to take into account in sentencing --

MR. NEUHARD: At second sentencing, your Honor.

QUESTION: Let's just say first sentence, second sentence, third sentence, any sentencing, a judge may not

take into consideration the fact that the defendant denies his guilt and shows no remorse whatsoever. I'm not arguing one side or the other on that. I'm just wondering what your position is.

MR. NEUHARD: I think there was one comment that was made, although it's a very difficult line to draw. We said in our brief, it was quoted in People v. Bottany, a Michigan Court of Appeals case, which talks about the lack of remorse which has -- the line that was drawn, it says, "You can take into account the positive aspect of remorse, but you can't penalize the man who stands adamantly before the court and protests his innocence, because he may indeed be innocent or he may be an individual --

QUESTION: Here it says that it's unconstitutional to take that factor into account.

MR. NEUHARD: That's correct. You can't punish him for not showing remorse.

QUESTION: If you're wrong on that, you don't have as good a case here, do you?

MR. NEUHARD: If I'm wrong on the fact that you can't take into account remorse? No, your Honor, I contend that the situation, the comparison aspect of, first of all, that you can't use a comparison aspect between the first incidence and the second incidence on the issue of remorse because it is highly questionable why he was remorseful in the first place.

And internally, whether it's the first, second, third, or fourth sentencing is important when you talk about considering i in this particular case. That is because you have a competing right to appeal in this particular case and any man who appeals is thinking about going to trial and he would be put in that position of claiming his innocence at the trial itself. And what you are necessarily saying is that the sentence can be increased. We think it is important that there is a difference between the first and the second sentencing on this remorse issue.

QUESTION: I take it the State's position is very close to saying that Pearce would never apply where in the first proceeding there is a plea of guilty which is set aside and then there is a retrial and conviction.

MR. NEUHARD: I wouldn't choose to speak for what the State's position would be.

QUESTION: Well, arguably in any one of those situations, as long as the judge said, "I have seen something -- I have made a reassessment of the defendant's character that the first judge didn't have."

MR. NEUHARD: I'm not quite sure I understand the point you are getting at, sir. As far as the vagaries of having the man plea guilty, then appealing and having the plea set aside, there are a multitude of reasons why that plea might be set aside. In this particular case --

QUESTION: The other side of the coin is that your position is that you should -- a defendant's conduct in the second trial in the courtroom should never be sufficient to evade Pearce.

MR. NEUHARD: Yes, that's precisely our point, your Honor, because necessarily in the process of an appeal of a guilty plea that was improper, the contemplation by the defendant that he is going to trial and that if he only sits there and does nothing, just simply let's his lawyer assert his innocence by saying, prove my guilt at this particular time, there are so many reasons why he might be sitting there that it is very difficult to predict just what --

QUESTION: That's quite different really, isn't it, if the man simply pleads innocent and says to the State, prove my case, or even if he takes the stand and testifies on issues that he could be believed on consistently with an overall verdict of guilty, compared to the getting on the stand and saying that, I was such and such a place and not where the crime was committed. That there are all different ways in which he could legally assert his innocence.

MR. NEUHARD: That's correct, your Honor. We agree with that. And because of that very factor, we think that there should be a due process hearing on the nature of his changed testimony which might necessarily exist in all cases where a plea has been vacated and the trial occurs. He is

entitled to be heard as to why it occurred in this particular way.

QUESTION: Was there such a hearing?

MR. NEUHARD: Well, in Michigan, your Honor, you have a right to allocution which the lawyer exercised and which the judge --

QUESTION: The defendant was there, wasn't he?

MR. NEUHARD: That's correct, your Honor.

QUESTION: And didn't the judge say what he took into account?

MR. NEUHARD: Your Honor, at the first sentencing, he stated the main reason why he was increasing the sentence was because he now knows more about the crime than the first judge knew about the crime. And we are contending that that is just factually incorrect, because that's the major fact we took into account that the worst for Mr. Payne that can happen in this is that it should be remanded for resentencing at this particular time.

QUESTION: Just as a matter of time and sequence, he was bound to know more because he knew about the intervening Bradford trial which the first judge couldn't have known about because it hadn't happened.

MR. NEUHARD: Well, the first judge did know about the intervening Bradford --

QUESTION: He didn't know about it when he sentenced

him.

MR. NEUHARD: Yes, he did. He sat on the Bradford trial.

QUESTION: But in the first trial when he sentenced this man -- had the sentence not been --

MR. NEUHARD: They held off sentencing until he had testified.

QUESTION: After the Bradford trial.

MR. NEUHARD: After the Bradford trial.

QUESTION: I see.

MR. NEUHARD: So the first judge knew necessarily all there was to know about the particular crime itself.

Now, our basic contention is that if there are occurrences within the second trial itself which might or might not amount to perjury, that because of this Court's statements in cases like Morrisey v. Brewer and Humphrey v. Katy, the recent cases, that you should be entitled to some due process hearing whenever the sentence is going to be increased or the terms of your confinement are going to be changed to give the defendant an opportunity to come forth and respond to those claims. In Michigan right now this is so close, what happened in this particular case is very close to In re Murchinson. You have a judge sitting up there without any kind of an opportunity to approach the judge, have the defendant take the stand and testify, you have an increase of 7 years on the

minimum and, I believe it was, 10 years on the maximum. That kind of a procedure where the terms of confinement and the length of confinement can be changed without any kind of a hearing, I feel, is just reprehensible under these fact situations.

QUESTION: The original sentence could be imposed.

MR. NEUHARD: Pardon?

QUESTION: In Williams we said the original sentence could be imposed on that basis, didn't we?

MR. NEUHARD: Well, we have no qualms with the original sentence being reimposed, in this particular case.

QUESTION: Including the death sentence. The choice between life and death was made in Williams, wasn't it?

MR. NEUHARD: Yes, your Honor, but in this particular case what we are concerned with is the actual increase in the punishment or the potential for rehabilitation, as you will, of this particular individual of 7 years. He had served at this particular time 7 years of imprisonment. He went back to court and got almost basically all that time over again to do with no time given for that 7 years he served.

QUESTION: I can understand his discomfiture over that. We can all understand that. But as a practical matter, in your experience as a public defender, isn't it a fair statement that at the end of a trial or at the end of a guilty plea, a judge frequently may have a certain impression about what he

is going to do. He may indicate to counsel that he will very likely grant probation, but sentence is deferred until he gets the presentence report. And when he gets the presentence report, and then he will not consider probation because at the time of the guilty plea and the right of allocution occurs, the defendant, the man is putting his best foot forward. But when the presentence report comes in, as in Williams, a whole new panorama is opened to the judge. As a practical matter, doesn't that happen?

MR. NEUHARD: Yes, your Honor, it does.

QUESTION: So that the situation can change by virtue of different impressions about the prospective rehabilitation.

MR. NEUHARD: That's correct, your Honor, and it's that very great danger that we are talking about in this particular case.

QUESTION: You say it takes a due process hearing to evaluate that second process?

MR. NEUHARD: That's correct, your Honor, because what they are alleging here is a separate crime and they are giving him no opportunity to be heard on that particular crime.

QUESTION: In Williams, going back to Williams, in Williams the sentencing judge actually, as I recall it, went around the neighborhood and talked to people and got information about him, and then had a presentence report perhaps in

addition. And then on the basis of that ex parte information in which the defendant couldn't have any possibility of challenging any of the information, he said this man is going to be sentenced to death. Now, wasn't that the whole issue, that there was no due process question involved in Williams?

MR. NEUHARD: We do not relent for a minute on the position that we should have access to that presentence report and have some control over the information being generated by that particular report. Those cases -- we have over 500 cases in Michigan right now pending in our office, and that's one of the major issues we are bringing to the courts continually is the right to see that particular presentence report and the right to respond to the information within it.

But accepting the fact that a presentence officer will do his job properly, which we do not know whether it occurred in this case or not, they had all the opportunity to do that at the first sentencing. Now, in this particular case, after that first sentencing, his conduct was exemplary, and the judge noted that on the record. That's what prevented him, he said, from giving the man life in prison.

QUESTION: His conduct in prison.

MR. NEUHARD: Where else would he be on a 19-year --

QUESTION: He would be in trial, the second trial.

MR. NEUHARD: In the course of the second trial, when the potential charge is one that amounts to perjury, which in

this particular case it was. If this were any other individual, he would have a right at that particular time to have --

QUESTION: Mr. Neuhard, is it clear in this case that the second judge when the second sentence was imposed took into account in assessing the defendant's character and his conduct since the first trial compared his conduct with his conduct at his guilty plea?

MR. NEUHARD: Yes, your Honor, they did.

QUESTION: So he is saying that while -- he had read the transcript at the first guilty plea, is that right, or not?

MR.NEUHARD: He read the transcript of the first guilty plea? I would assume so from his comments.

QUESTION: Did he say that while he had confessed his guilt at the first guilty plea, he denies it now?

MR. NEUHARD: Yes, your Honor. He talked about the lack of remorse.

QUESTION: Now, isn't this using a guilty plea that has been set aside as invalid as the product of a coerced confession, isn't it using that guilty plea in some way in a subsequent proceeding?

MR. NEUHARD: Yes, it is, your Honor.

QUESTION: Do you make that point or not?

MR. NEUHARD: We do inferentially, your Honor, in that we consider any consideration of a lack of remorse was improper, and that gets to the point where you said he

confessed in the first trial --

QUESTION: That would be the same point even if he never knew the man had pleaded guilty the first time.

MR. NEUHARD: Well, he didn't state it that way, though, your Honor, that because you pled not guilty in this trial, I'm taking into account your lack of remorse. He referred back to the original proceedings in this particular case because, as his first affidavit stated in this particular case, of the many points he made,about 8 of them dealt with his increased knowledge about the defendant and also his apparent lack of remorse that he had at one time expressed for the shooting of the two police officers. And it was directly related to the product of the first pleas. There was no contention it was internal to the second trial and the sentencing, that he was internally consistent.

QUESTION: You're not attacking the basic conviction, just the increase in the sentence.

MR. NEUHARD: That's correct, your Honor.

QUESTION: So that means that in this Court here and now today, it must be accepted that the verdict was correct and the judgment of conviction was correct, namely, that he did shoot these police officers.

MR.NEUHARD: Well, the verdict as it stands, that the jury found that he in fact had shot the police officers, is at this time a valid verdict.

QUESTION: At this time. Are you suggesting a challenge to it?

MR. NEUHARD: I won't speak for what Mr. Payne intends to do with that particular conviction as far as collaterally attacking it. But at this time this Court can approach the conviction as being valid, the conviction itself. In that particular proceeding, as I indicated, Mr. Payne took the stand and testified as to why he didn't have the car and the gun. The jury chose to believe the State's evidence, and whatever inferences are permissible to draw from that, this Court, I think, is engaging in speculation compared to the right he was attempting to assert which is the right to appeal, his right to have a higher court review what occurred in the lower court. And that primarily is the thrust we are making then, if this particular Court will allow a lower court to take into account internally the lack of remorse that he shows at the second trial or comparative between the plea and the trial, that it is highly speculative compared to the rights which are being asserted. And also that Michigan's present sentencing scheme takes those factors into account, that the indeterminate sentencing by its very nature is taking into account the character and make-up of the individual.

Further, I would like to point out to this Court that Judge Hadsell, the first sentencing judge on the issue of remorse, said that you may get out early if your present

condition continues. He was implying directly in there what the Department of Corrections generally can do, which is hold a man longer if he is recalcitrant, if he is not showing positive signs to being able to return to the community, that Judge Hadsell was very aware of this particular problem. And to allow perjury to be -- and I think it's very important to state here -- to allow perjury to increase a sentence in a second trial is a very dangerous precedent because anybody who appeals from a guilty plea and then goes to trial and states his reasons and is convicted would necessarily under that implication be guilty of perjury. And it does away completely with the requirements of trying a man for perjury. And that's a very dangerous precedent whether you are talking about appellate matters or whether you are talking about simply the first sentencing matter that it's very important that an individual feel that he can take the stand and state what he wants to state and that he has a due process right following that particular statement if he is going to be charged with perjury.

QUESTION: What's perjury in Michigah? Five years?

MR. NEUHARD: In this particular case it would have been life imprisonment.

QUESTION: For perjury?

MR. NEUHARD: That's correct, your Honor. The perjury statute in Michigan states that the maximum of 15 years in

prison, unless the crime of which you were charged was life imprisonment, and in this particular case the crime was life imprisonment potentially, and it carried a life imprisonment.

QUESTION: You know there wasn't much percentage in the prosecution prosecuting him for perjury in light of the heavy sentence he already had.

MR. NEUHARD: Well, your Honor, it would have increased his sentence. If they felt that it was important for his sentence to be increased because of the nature of his perjury, then I feel they could have gone to trial and the judge certainly at that time was free to give him anything up to life. But he would have at least had the opportunity to appear in court and attempt to justify why he said what he did. And we have all the concomitant rights that go with it. He would at least have had a hearing which in this particular case he didn't even get a hearing, let alone a trial on the matter to be in front of a jury. Because, as I indicated --

QUESTION: Did he not have a trial before a jury?

MR. NEUHARD: Not on the issue of perjury, your Honor.

QUESTION: Well, when a defendant takes a stand and testifies, does he not tender the truth or falsity of his own testimony?

MR. NEUHARD: That is correct, your Honor. That's why he takes the oath. And the whole point behind -- if the oath itself is not followed, that's why we have a perjury statute

in Michigan that is so severe, because of the collateral consequences of it.

QUESTION: Referring to Judge Byrns' affidavit executed last November 29th and appearing on page 21a of the appendix, the paragraph 4 there seems to be an open invitation to this Court to order production of the supplemental presentence report. At least that's the way I read it. It's an affidavit filed in this Court and it says he can't make it public, but "a higher court than this one can order produced." I read that as an open invitation. Would you have any objection if we accepted that invitation?

MR. NEUHARD: I would not, your Honor, but I think I would point out to the Court that in our Appendix A, we have the motion which we made for the production of the presentence report, and in that particular motion itself --

QUESTION: Appendix what page?

MR. NEUHARD: It's page 1a of our appendix in our brief.

QUESTION: Thank you. Of your --

MR. NEUHARD: Of our brief on appeal, the white copy, your Honor.

On page 3a of that particular appendix, Judge Byrns states, "This court has followed a policy generally in sentencing to tell the defendant exactly what it is in the presentence report that has influenced him and to give the defendant the

opportunity to explain or to correct."

In this particular case, we are relying on Judge Byrns' statement that he has stated all the reasons why he increased the sentence and there is nothing in that particular presentence report.

QUESTION: What page was that on?

QUESTION: Well,he says there is.

MR. NEUHARD: That's on page 3a of our appendix, your Honor, the bottom paragraph.

QUESTION: He applied, at least I thought, that there was something.

MR. NEUHARD: I think, your Honor, there is a clear implication that there might be something in there, but assuming he followed his general policy which he stated here, then he would have stated all his reasons. We assume there is nothing.

QUESTION: Well, one who saw it could determine, could resolve the ambiguity.

MR. NEUHARD: That's correct, your Honor.

QUESTION: Are you familiar with the case of Giles in Maryland?

MR. NEUHARD: Not directly, your Honor.

QUESTION: That's a case where this Court called up a presentence report and turned a result on what we found in it.

MR. NEUHARD: Your Honor, I would like to point out one factor in this particular case which I mentioned at the

outset which is this is a very complex case. Judge Byrns has now had four opportunities to say why he sentenced this particular man. At the first sentencing he stated, I'm not sentencing you because of your appeal. Then he had the second affidavit, the affidavit in this Court, and he had the opportunity and our motion for production of the presentence report. And we feel that I don't know how many more opportunities a man should be given to state why he sentenced a man, but that it should be within the confines of these particular affidavits.

QUESTION: Well, this would be within the confine of the affidavit of November 29, paragraph 4, wouldn't it?

MR. NEUHARD: Yes, your Honor, but I feel that according to the way I read his implications, there should not be anything there. But again it makes it difficult for counsel to approach the affidavit if this is the method that's to be employed.

QUESTION: Certainly it does. That's the reason I asked the question if you would have any objection.

MR. NEUHARD: Well, your Honor, in that I don't expect there is anything in there and if there is, I would be very surprised by his comment, and I would object to it, ff this Court feels there is something in there, not having the opportunity to respond to it, because we made the good faith effort to get it and told Judge Byrns he had the power to release it to us, and it was denied to us. So I assume there is nothing in there, that we have before us on the affidavits --

which the Michigan Supreme Court, by the way, requested from him -- his reasons for the increase. And in the affidavit he gave to them, whatever he stated they found wasn't enough in which he stated the subsequent conduct, and he also stated the lack of remorse and the contrary testimony. They found, as a matter of fact and law, that it was not enough.

QUESTION: This is the new one filed, as you know, in this Court, and he does make this reference in paragraph 4 and does point out that a higher court, presumably this one, can order it to be produced.

MR. NEUHARD: I know he said that, your Honor, and I am at a loss as to what -- we did everything we could do to obtain that in time to come to this Court, and we have not been able to obtain it. I would assume there is nothing in there.

QUESTION: He didn't offer to give it to you.

MR. NEUHARD: Pardon?

QUESTION: In this affidavit he didn't offer to give it to you.

MR. NEUHARD: That's correct, your Honor, he did not.

QUESTION: I suppose there is nothing in the record that would show how long a hearing was held at the time of the original guilty plea and sentence, but I suppose also that that's a relatively brief procedure.

MR. NEUHARD: In Michigan, as a matter of fact, it is

a very brief procedure.

QUESTION: And the judge says in his affidavit that without going into what is already part of the record -- and I am inserting because there is antecedent "I" -- was greatly influenced by the brutal details of the crime which over a period of three days plus its, the judge's, own impressions of the defendant during these days plus the impression of his testimony during those trials. So the judge has a great deal more in that sense, a better opportunity to observe and draw inferences from the conduct of the defendant than the sentencing judge on a guilty plea. Would you agree?

MR. NEUHARD: No, I would not, not in this case, your Honor, because the first judge had sat in the trial of Lionel Bradford and heard all the testimonies. In fact, both police officers testified there, not just one as they did at his second trial.

QUESTION: Then you are saying that when he said that, this is not true?

MR. NEUHARD: That's correct, your Honor. I'm suggesting he was unaware at the time or just didn't take into account the fact that Judge Hadsell had known all the facts.

QUESTION: As a matter of fact, what he said at the second sentencing, he in effect retracted in the affidavit he filed in this court, because he now acknowledges what he said was not the case at the second sentencing, namely, that Judge

Hadsell did have the opportunity to know all about the case because he presided at the Bradford trial.

MR. NEUHARD: That's correct, your Honor.

QUESTION: And that first comes in the record when we get the affidavit here in this Court.

MR. NEUHARD: That's correct, your Honor.

Are there any further questions?

MR. CHIEF JUSTICE BURGER: That will be all, Mr. Neuhard.

MR. NEUHARD: Thank you.

MR. CHIEF JUSTICE BURGER: We will enlarge your time in view of the enlargement here. You can have about four minutes. You were down to one.

REBUTTAL ORAL ARGUMENT OF JOHN A. SMIETANKA

ON BEHALF OF THE PETITIONER

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

With regard to the case of the presentence report, in the argument before Judge Byrns and prior to it in the formal argument, the actual argument before him before the final ruling was put on the record and included in the appendix, it was suggested to Mr. Benson by myself and also, I believe, by the judge that we would have no objection, and we suggested that he come up to this Court and request the Court to free this, to bring this presentence report up to this Court. So it's not a question of exhausting all alternatives because that

alternative was suggested to him.

QUESTION: Are you suggesting giving him a copy of it?

MR. SMIETANKA: This would then put the burden on this Court, if the Court wanted the defendant to have a copy of it, the judge would have no objection, could have no objection.

QUESTION: But the only way the defendant can see it is for us to order it. That's the only way in the world. That's the way the ruling was made.

MR. SMIETANKA: Yes, your Honor. And the reason for it was that because of Judge Byrns' feelings on the matter of disclosure of presentence reports which he included in his ruling, the reasons why he feels they should be confidential, namely, to protect the sources of the information, not to have these sources dry up, and to give the judge as much latitude as possible to consider information both favorable and unfavorable to the defendant.

With regard to the time between the original sentence and the original appeal, there was some doubt as to how long that was. The record will indicate it was 3 years.

The case of Murchinson was cited several times, and we feel that it's not applicable at all. In that case we are dealing with a determination by the same judge and only by that judge of whether or not perjury had been committed when the first determination was made, the perjured statement or

the alleged perjured statement was made in a one-man grand jury situation. There was only one person there to hear the perjury, and that was the one-man grand juror himself. And the Court required that that type of proceeding required a full hearing by another judge for the contempt citation to stand.

And furthermore, with regard to the issue of perjury, I'm not absolutely sure, but I believe that the law in Michigan as it stood at the time of the second trial or the trial was not that it was punishable by life, but rather by 15 years and that it was subsequently amended to make it life. I believe there was some question in that area. But I do not know the citation of that. I can't give it to the Court.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Neuhard, you were not appointed by the Court in the usual procedure, but you came here at our request indirectly, at least, and on behalf of the Court I want to thank you for your assistance not only to your client, but your assistance to the Court.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:56 p.m., the argument in the above-entitled case was submitted.]