In the

Supreme Court of the United States

DOUGLAS DORSZYNSKI,

Petitioner,

v.

UNITED STATES,

Respondent.

No. 73-5284

Washington, D.C.
March 20, 1974

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v.	:	No. 73-5284
UNITED STATES, Respondent.	:	

Washington, D. C.,

Wednesday, March 20, 1974.

The above-entitled matter came on for argument at 2:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM 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:

ROBERT H. FRIEBERT, ESQ., 710 North Plankinton Avenue, Milwaukee, Wisconsin 53203; for the Petitioner.

GERALD P. NORTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-5284, Dorszynski against the United States.

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

ORAL ARGUMENT OF ROBERT H. FRIEBERT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIEBERT: Mr. Chief Justice, and if it please the Court:

My name is Robert Friebert, and I represent the petitioner, Douglas Raymond Dorszynski. The respondent is the United States of America.

This case involves a petition for certiorari to the Court of Appeals for the Seventh Circuit, and this case originally arose out of an appeal from the United States District Court for the Eastern District of Wisconsin, the Honorable Myron L. Gordon presiding.

The issue involves an interpretation of the Federal Youth Corrections Act, and in particular the issue involves the procedural requirements which must be met before a youth offender can be sentenced as an adult.

The Act, on the particular point in question, states as follows: And this is Title 18, 5010(d):

"If the court shall find that the youth offender will not derive benefit from treatment under the Act" -- I

paraphrase there -- "then the court may sentence the youth offender under any other applicable penalty provision."

Synthesized further, then, the issue before the Court here is whether a sentencing court sentencing a youth offender, who is a defendant under the age of 22, must articulate its findings of no benefit on the record; and, further, when the sentencing court must support that finding with reasons.

The facts are as follows:

The petitioner, Douglas Dorszynski, was convicted of possession of LSD, in violation of 21 USC 844(a), at a time when he was 19 years old. He was no longer a juvenile, but he was subject to the provisions of the Federal Youth Corrections Act.

The particular charge involved was a misdemeanor, subjecting him to a maximum penalty, were he simply an adult, to one year in jail or prison.

Petitioner pled guilty. The trial court sentenced the petitioner to a split sentence of 90 days in jail to be followed by a probationary period, outside of jail, for two years.

At the time of his arraignment and his plea of guilty, he was not told that he could be sentenced under the Federal Youth Corrections Act for a period of control in essence of about six years, with four years in prison.

At the sentencing proceeding, the trial court never mentioned the Federal Youth Corrections Act, when it imposed its sentence as an adult. Post-trial motions were filed, which challenged the adult sentence, and challenged it in particular on the grounds that the trial court had made no findings on his reasons why he rejected a sentence under the Federal Youth Corrections Act.

At the time of the post-trial motions, the sentencing court stated that the Act was not applicable, and he further stated that he, when he sentenced the youth offender as an adult, that there was an implied finding on his behalf. And he said no more.

The Court of Appeals agreed that the trial judge did not have to explain his reasons in any way as to why he did not sentence under the Federal Youth Corrections Act, why he made a finding of no benefit under the Act, and affirmed this aspect of the case.

QUESTION: I have the impression that somewhere in the record the United States Attorney had referred to the Youth Act. Was that at the arraignment?

MR. FRIEBERT: Yes. The Act was referred to twice at the arraignment. It was under the provisions of the Code, the defendant had stated that he was going to plead guilty and a pre-sentence investigation was done before he came into court. So the proceedings at the arraignment were also a

sentencing proceeding with benefit of a pre-sentence report.

The United States Attorney, in court, stated that the defendant was a youth offender and subject to the Youth Offenders Act, but he did not state that the Youth Offenders Act subjected the petitioner to a potential four years' incarceration.

This was followed by the same Assistant United States Attorney stating that the penalty maximum was one year, which was an incorrect statement of the law under the circumstances, because the maximum penalty was six years in actuality; and then the judge made that statement, and further emphasized the one-year maximum to the petitioner.

After the plea of guilty was entered, the court recessed to consider the pre-sentence investigation report, which had been previously prepared.

Upon reconvening, the Federal Youth Corrections Act was mentioned the second time, and that was by the petitioner's counsel at that time, who asked that probation be given to the petitioner and that this probation be under the Federal Youth Corrections Act.

The trial court then imposed the sentence, the split sentence of 90 days in custody, to be followed by two years' probation, without in any way commenting upon the Federal Youth Corrections Act.

The only time the trial court commented on the Act

was in the post-conviction hearing, when he said that a finding that the Act was inapplicable could be implied from the record in the case. And he stated no reasons in the post-trial, post-conviction hearings, either.

QUESTION: Which you've already said -- at least I thought I heard you say, that if he had been sentenced under the Youth Corrections Act he might have got as much as six years.

MR. FRIEBERT: Correct. That's correct.

QUESTION: All right.

MR. FRIEBERT: Which leads to --

QUESTION: Mr. Friebert, before you carry on, suppose the court had stated, either on the record or in its order, that it found that the youth offender would not benefit from the remedies provided by the Act, but stated no reasons for his finding, what would your position be?

MR. FRIEBERT: Mr. Justice Powell, I would still be here, saying that that was an insufficient record, that he would have to support his finding with appropriate reasons.

The record in this case demonstrates perhaps why --

QUESTION: But what is it that you base that on?

MR. FRIEBERT: He has to gain the potential created by Congress in 5021 of Title 18, that upon an early discharge from probation, that his conviction will be wiped

from his record and that he will --

QUESTION: Well, I know, but suppose it goes back for resentencing under the Youth Corrections Act.

MR. FRIEBERT: Yes.

QUESTION: What kind of sentence may the judge impose?

MR. FRIEBERT: On this record, I don't think, in light of North Carolina vs. Pearce, and everything else, that he'd be able to do anything but probation, unless he could support that with intervening circumstances. So probation would be the only thing in the picture under the particular facts of this case.

QUESTION: Well, suppose he had -- I gather your position isn't merely because of his age, that the district judge had first to determine that the Youth Corrections Act was inapplicable. You don't say that, do you?

MR. FRIEBERT: No, I -- yes, I say --

QUESTION: You do?

MR. FRIEBERT: -- that the word "inapplicable" is indicating that --

QUESTION: Well, what you say, then, is that on the plea being entered, the judge had, initially, to determine whether he should apply the Youth Corrections Act?

MR. FRIEBERT: Correct.

QUESTION: And if he had decided that he should,

then what sentence could the judge have imposed?

MR. FRIEBERT: He could impose probation under the Act, he could commit him as a youth offender under the Act, and as that commitment potential which puts him in a position of facing four years --

QUESTION: That's the six years?

MR. FRIEBERT: Yes.

QUESTION: That's the six years you're talking about?

MR. FRIEBERT: That's correct. But probation is available under the Federal Youth Corrections Act --

QUESTION: Then I gather the argument of counsel would have been, had the judge considered it and decided to sentence under the Youth Corrections Act, counsel would -- what? -- have argued nothing but probation for this?

MR. FRIEBERT: Sure, that's what counsel argued, probation under the Act.

The confusion, I think, in this record demonstrates a serious question of whether the Federal Youth Corrections Act was really considered by the trial judge. The petitioner is not properly advised as to the potential penalties which he faced, which leads to a postulation, at least, that there might have been confusion among the defense attorney and everybody.

QUESTION: If the district judge -- it's up to the

district judge to decide whether he should sentence under the Youth Corrections Act, after making a determination of benefit and so forth, if he does, and I gather that the defendant, having pleaded guilty, he can't control what the judge does in that respect, can he?

MR. FRIEBERT: I think that the Federal Youth Corrections Act creates a policy by Congress that when a youth offender is convicted, that the options available to a sentencing judge are circumscribed by the Act. He must start out by favoring a sentence under the Act. Because that is a favored position that the youth offender is in by reason of his very age.

QUESTION: And so that if he decides that it would benefit the defendant by sentencing him under the Act, that he must sentence under the Act, he has no option then to sentence as an adult?

MR. FRIEBERT: I would change the language slightly: if he makes no finding, or if he has doubts, or if he doesn't even consider it, the sentence must be under the Act. That the only time an adult sentence can be given is if he makes a specific finding of no benefit.

QUESTION: With reasons.

MR. FRIEBERT: With reasons, that's correct. So I would -- he does not, in my --

QUESTION: Does the legislative history to the Act

indicate that that's what the Congress intended?

MR. FRIEBERT: I don't believe the legislative history demonstrates that this issue was considered at all. What the legislative history --

QUESTION: What did Judge Phillips testify to, and several other federal judges, including the Chairman of the Committee of the Judicial Conference?

MR. FRIEBERT: Those judges and those gentlemen at the time, Mr. Chief Justice, indicated that this would not -- the Federal Youth Corrections Act would not have any change in the traditional sentencing patterns given to a sentencing judge.

I don't believe that those statements demonstrate any consideration of the issue involved in this case.

That is the principal position of the government, that somehow a statement of -- that this doesn't change traditional sentencing alternatives of a sentencing judge, magically changes its form into a statement that a trial judge is not required under this Act to state reasons.

In fact, the traditional sentencing prerogatives of a court at no time gave a trial judge unfettered discretion without any review of his discretion. The --

QUESTION: Well, is it your position, then, that if the legislative history you don't feel is compelling, that we must abide just the actual language of the statute?

MR. FRIEBERT: Yes. The actual language --

QUESTION: Well, where in the actual language of the statute do you find the requirement that the trial judge give reasons?

MR. FRIEBERT: In the word of art, "shall find". I think the phrase and the word "find" is a legal word of art, which is not in any way confusing to anyone. It means findings and supported by reasons, because that is the way I believe that lawyers communicate with each other. "If the court shall find that the youth offender will not derive benefit" means just that. He shall make a finding and support it with reasons.

QUESTION: Well, supposing in the analogous provisions of the Rules of Civil Procedure, where it says that a court must make findings of fact and conclusions of law, certainly a judge who makes a finding of fact that a particular event occurred at a particular time isn't required in addition to give you the reasons why he reached that finding.

MR. FRIEBERT: I think it's implicit in the record that might be before the court as to whether his findings conform with the evidence which was before him.

If you have a sentencing proceeding, you have nothing but a most barren record. All you have is a charge, a pre-sentence report, and a judge not saying anything.

QUESTION: Well, there are a lot of pre-sentence reports that aren't so barren.

MR. FRIEBERT: Yes, there are, Mr. Justice White, but that doesn't even indicate that the trial judge relied upon the pre-sentence report. He said nothing.

QUESTION: Well, I know, but as Mr. Justice Rehnquist says, strictly a finding of fact in an ordinary trial doesn't necessarily have to refer to any evidence, or even -- it just has no reasons.

MR. FRIEBERT: I believe and it's our position that when the statement that the court shall find, with a barren record such as we have here, that it must support its findings. And that position --

QUESTION: Well, I gather, though, Mr. Friebert, this is because -- I now understand you -- you derive this out of paragraph (d). Your position is that there must be a sentence under the Youth Corrections Act unless a finding that the offender will not derive benefit, found under (d), is made.

MR. FRIEBERT: Correct.

QUESTION: Is that it?

MR. FRIEBERT: That is my position.

QUESTION: And your basic proposition is that there must be a sentence under the Youth Corrections Act, unless this finding is made, and there must be a record in

the form of a finding supported by reasons.

MR. FRIEBERT: Correct.

QUESTION: In order that, on judicial review, if the sentence is under some other penalty provision, it can be said whether the sentencing judge erred or not; is that right?

MR. FRIEBERT: That is correct.

I might state that the government does not seem to fervently argue that this should not be a record. In fact, they state that, at pages 48 and 49 of their brief, that they would not oppose a requirement for an express finding that the youth offender would not benefit under the Act.

And this Court --

QUESTION; Oppose that by whom, by Congress?

MR. FRIEBERT: I'm sorry, Your Honor?

QUESTION: By Congress?

MR. FRIEBERT: The finding?

QUESTION: No. A requirement --

MR. FRIEBERT: The requirement of a finding. I first start with the proposition that the word "find" is a legal word of art and that that is a statement of Congress.

QUESTION: No, no, I'm directing it at something else. I'm directing it at your statement that they have conceded that they would not object to such a requirement.

MR. FRIEBERT: Yes.

QUESTION: Do you construe that to mean they wouldn't object if Congress wrote a statute that way, or a court construed it that way, or what?

MR. FRIEBERT: I think in the context of their position is that if this Court were to establish such a policy they would not oppose it.

QUESTION: Well, we don't establish policies, we construe statutes.

MR. FRIEBERT: And this Court also establishes policies in the light of North Carolina vs. Pearce, to effectuate an increased penalty, there must be a record with findings to support an increased penalty after a defendant has been reconvicted after reversal of his original conviction.

That enforces a policy, a constitutional policy, [sic] Specht vs. Morrissey, which is another sentencing proceeding, in which a Colorado Sex Crimes Act was imposed as a sentence after a conviction, this Court said that that type of commitment, namely as a sex offender, required an additional finding, and that therefore the sentencing judge cannot just commit as a sex offender, even though he had been convicted of a crime; but he must make the new finding, he must support the new finding after notice and a hearing, and he must state his reasons on the record as to why he made that

finding, so that it would be subjected properly to appellate review.

QUESTION: Did I understand you to say before that if this case went back, if you prevail and the case went back, that he could not now be sentenced under the Youth Corrections Act to any greater or different sentence from the one that was imposed, that is 90 days plus probation.

MR. FRIEBERT: Yes, I think that then the trial judge runs across North Carolina vs. Pearce.

QUESTION: Yes. Well, --

MR. FRIEBERT: It's an increased benefit.

QUESTION: -- then the Youth Corrections Act would be frustrated, wouldn't it?

MR. FRIEBERT: No, I don't think the Youth Corrections Act would be frustrated, --

QUESTION: Well, could you give him six years?

MR. FRIEBERT: No. The man has served, in fact, his 90 days; after -- he is now presently on probation. We have not sought any stay pending a review by this Court.

The judge, what we would ask him to do is to sentence him under 5010(a) to probation, under the Federal Youth Corrections Act. And that that would be the sentence which we would be seeking which would not in any way frustrate any of the policies enunciated previously, and is probably the most appropriate sentence under the facts of the case.

QUESTION: Well, what different position would he be in than he is now, if that's all he had to do?

MR. FRIEBERT: He would be able to have his conviction wiped from the record, were he --

QUESTION: Yes, I see.

MR. FRIEBERT: -- discharged from probation at the -- prior to his completion of his probation period. It's a substantial benefit.

QUESTION: Yes, and he would a different --

QUESTION: That wouldn't be automatic.

MR. FRIEBERT: I'm sorry?

QUESTION: Excuse me.

QUESTION: That wouldn't be automatic.

MR. FRIEBERT: No. It would be automatic if he were released from probation prior to the completion of his probation period. That would be 5021, I believe, (b).

QUESTION: And he would be in different hands during probation?

MR. FRIEBERT: He would be in the hands of the Probation Department, the same Probation Department that would take him, whether he's on probation under the Act or not.

QUESTION: The same people?

MR. FRIEBERT: Yes.

QUESTION: The same standards?

MR. FRIEBERT: I believe so. I don't know of any

standards that differ. It would be with the Probation Department of the Eastern District of Wisconsin.

So that the substantial -- the substantial benefit in this case is the ability to obtain an ending of the incumbrance of his previous conviction. And that's the substantial benefit which the Act provides, one of the substantial benefits that happens to be, in this particular case, the substantial benefit which brings us to this Court.

And that being a substantial benefit, being a substantial congressionally mandated benefit, is in fact a right that he has, unless the Court makes a finding of no benefit. And there was no such finding.

And since the finding of no benefit is the equivalent of taking away a substantial congressionally created right, then it's our position that both in this case --

QUESTION: Well, Mr. Friebert, if you prevail in this and the case goes back, what's to stop the district judge, then, from considering whether he derived benefit, and arriving at conclusions with reasons that he wouldn't, and then things stay just as they are?

MR. FRIEBERT: Then we would be able to have a determination as to whether those were appropriate reasons under the Act.

QUESTION: Which means -- so you'd then have another review?

MR. FRIEBERT: Perhaps.

QUESTION: But you also insist on a hearing in connection with the determination.

MR. FRIEBERT: Yes, the hearing -- I don't mean to overstate that prospect. The hearing --

QUESTION: Yes, but you would -- you think there's something involved here other than an ordinary sentencing procedure.

MR. FRIEBERT: Yes.

QUESTION: That you should then have a chance to cross-examine a witness or present some evidence?

MR. FRIEBERT: Perhaps present evidence. I'm not so sure about cross-examining witnesses. In fact, the government --

QUESTION: But you would think he would not be permitted to rely on an uncross-examined pre-sentence report.

MR. FRIEBERT: I don't think there is, as a practical matter, I've read this pre-sentence report, it's not a part of this record, there is nothing that would affect that in this --

QUESTION: But if there were, I can imagine what your position would be.

MR. FRIEBERT: Yes, if the trial judge is going to rely upon a statement in the pre-sentence report, involving a witness or another person with which we disagree with,

I think we would have the right and the prerogative to challenge that, and I don't think that Williams vs. New York touches on that issue whatsoever. Williams is the case apparently principally relied upon by the government. In Williams, the only challenge was that a sentencing judge who had imposed the death sentence instead of life imprisonment, after a jury came in with a recommendation of life imprisonment, whether the defense had a right to totally cross-examine and be confronted by the witnesses on evidence, or statements which appeared in the presentence report.

QUESTION: I have another problem. Are you going to use beyond a reasonable doubt, or what are you going to use as your standard?

MR. FRIEBERT: I think the court -- I don't --

QUESTION: I personally don't see why a finding means hearing. I think you can make findings without a hearing.

MR. FRIEBERT: Well, it's got to be, I believe, Mr. Justice Marshall, some kind of record.

QUESTION: Well, I would say a pre-sentence report which shows that in the 30 years of this man's adult life he's been in jail 29 years and a half, I don't think I have to need a hearing to make findings.

Do you?

MR. FRIEBERT: Perhaps. It depends -- first of

all, you have to be 22 years --

QUESTION: Do you?

MR. FRIEBERT: Oh, there might be. There might be some basis for challenging the validity of the statement in the pre-sentence report that -- and a challenge of the accuracy of it. The District of Columbia Court of Appeals has --

QUESTION: I don't have any -- I'm saying that this is a pre-sentence report, and it says what I said, 29 and a half of his 30 years he's been in jail. And you say that is not enough, by itself, standing as it is alone, for the judge to make a finding that this man is unfit.

MR. FRIEBERT: That's correct. I would challenge that. And several reasons why. Perhaps the --

QUESTION: I didn't use the word "perhaps" with it.

MR. FRIEBERT: Well, perhaps the defendant challenges the statement as not being a fact.

QUESTION: I said there was nothing else there but that.

MR. FRIEBERT: And the defendant says it's not true. He hasn't been in prison 29 and a half out of 30 years. He's entitled, I would think, to a hearing.

QUESTION: And what would the hearing be?

MR. FRIEBERT: To determine whether that's true or

not.

QUESTION: Well, what would the hearing be?

MR. FRIEBERT: The hearing might be to -- if there has been a mistake in the report, there's been a name identification problem, the fingerprints are --

QUESTION: Then all you could do would be to attack the finding.

MR. FRIEBERT: Attack the fact. The factual basis of the finding.

QUESTION: The finding is the fact.

MR. FRIEBERT: Of 29 and a half years?

QUESTION: Right.

MR. FRIEBERT: Yes. He attacks that finding by the Probation Department as not being true, correct.

QUESTION: It would be your burden then, wouldn't it?

MR. FRIEBERT: Perhaps. I don't know whose burden it would be.

QUESTION: I give up! You'll agree on something one of these days, without "perhaps".

MR. FRIEBERT: Well, I think I -- excuse me.

QUESTION: If I could interrupt for a moment. Just on its face, subsection (d) seems to be triggered, namely, the necessity for a finding seems to be triggered only if the court proceeds under (b) or (c).

MR. FRIEBERT: No. I think -- the way I read the entire 5010 --

QUESTION: This defendant was put on probation.

MR. FRIEBERT: Correct. Without any statement.

QUESTION: Well, I know, but what's the reference to (b) or (c)? There's an (a) here that speaks about probation.

MR. FRIEBERT: Correct.

QUESTION: And (b) or (c) doesn't seem to -- (d) speaks only of (b) or (c).

MR. FRIEBERT: Correct. But it is the -- it is the triggering device for bringing a youth offender into a sentence as an adult.

QUESTION: But (a) says, quite independently, if the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence.

Now, (d), which you're relying on, has no reference whatever to (a).

MR. FRIEBERT: Yes, that would -- that raises an issue which I raised in the Seventh Circuit and which has been uniformly rejected by every Circuit Court that has seen it to date, as far as I know, and that is that there is only one kind of probation under the Act. Namely, if a youth offender is placed on probation, he's automatically under the Act.

I point that out at page 21 of my brief, in the footnote, that the issue has been rejected; if that is a correct interpretation, then he is on probation and under the Act now. In which case, the issue which I bring to you is not here.

But --

QUESTION: That might require some other lawsuit, but not this one.

MR. FRIEBERT: But the general, at least consensus is, of which I disagree, is that you can make a finding of no benefit and go to an adult sentencing proceeding and put the defendant on probation.

QUESTION: Well, as a matter of fact, from what you told me earlier, that as you now see it (d) -- initially the trial judge has to sentence under the Act, unless he makes the finding called for by (d).

MR. FRIEBERT: Correct. And that sentencing under the Act is either an (a), (b), or (c) sentence; either probation, commitment, or (c), which is not applicable, which would be extended commitment.

And without the finding under (d), that is his opinion and nothing more.

QUESTION: Well, yes, but the thing that (d) speaks about is treatment.

MR. FRIEBERT: Yes.

QUESTION: Treatments under (b) or (c), and you don't ordinarily think of this probationary period under the same probation officers as an adult would be, as a youth offender treatment.

MR. FRIEBERT: It is a youth --

QUESTION: That's why (d), it seems to me, speaks of treatment, and it speaks of (b) or (c).

This probation is under the same probation officers as an adult would be under.

MR. FRIEBERT: Correct.

QUESTION: Under the same conditions.

MR. FRIEBERT: Correct.

QUESTION: So that it's not -- it is not a probation that's tailored to anything special about the Youth Offender Act.

MR. FRIEBERT: It's a probation that is tailored with an end result to be beneficial.

QUESTION: Yes, but it isn't treatment. But it isn't treatment.

MR. FRIEBERT: Well, I believe probation is treatment.

QUESTION: Well, I know, but it isn't Youth Corrections -- youth offender treatment.

MR. FRIEBERT: It is -- since it is not a serious offense, a sentencing judge who believes a youth offender

should be given probation, would seem to me should be by congressional mandate, entitled to have his conviction wiped.

QUESTION: Well, I know, but it seems to me that early termination, wiping -- I just don't understand why you call that treatment.

QUESTION: Well, you have to because that's the word the statute uses.

MR. FRIEBERT: That's correct.

My time is up.

MR. CHIEF JUSTICE BURGER: Mr. Norton.

ORAL ARGUMENT OF GERALD P. NORTON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think at the outset it would be useful to focus on what the issues before the Court are today.

There has been a lot of discussion about the nature of the hearing that must be held if this matter goes back for resentencing, whether the judge were to reach the same result after making a finding and statement of reasons, whether that would be subject to appellate review.

The original issue raised by the petitioner in the District Court was whether he could have been sentenced under provisions other than the Youth Corrections Act, where the trial judge had not made an explicit finding to

the effect that he would not derive benefit from treatment under section 5010(b) or (c) of the Youth Corrections Act.

QUESTION: Do we know, Mr. Norton, under -- whether the trial judge at any time said "I am not going to sentence under the Youth Corrections Act"?

MR. NORTON: The sequence was this: The U. S. Attorney mentioned, at the commencement of the arraignment, that the case was one to which the Act might be applicable. Petitioner's original attorney requested that he be sentenced under the ACt, and asked for probation under the Act. The judge, when he imposed the split sentence involving probation under section 3651 of Title 18, did not make any reference at that time to the Act.

QUESTION: So we -- well --

MR. NORTON: At a later point, when the --

QUESTION: So at the time of sentence, in any event, he did not say "I'm sentencing under the Act" or "I'm not sentencing under the Act"?

MR. NORTON: That's correct.

QUESTION: Right.

MR. NORTON: And then at a later point, when the sentence was challenged, he ruled that he disagreed with the District of Columbia cases that said that there had to be an explicit finding, and his determination that petitioner should not be sentenced under the Act was essentially implicit

in his sentencing him as an adult under probation.

QUESTION: So he interpreted what he did at the time of sentence as an interpretation -- as a sentence outside the Act?

MR. NORTON: That's right.

QUESTION: Right.

MR. NORTON: And the Court of Appeals held that it was not necessary under the Act for an explicit finding in the words of 5010(d), that he will not derive benefit from treatment to be made.

QUESTION: Didn't I understand your friend to say that the sentencing hearing and the preliminary hearing were at the same time, that this was a telescoped proceeding?

MR. NORTON: Yes, there was a recess, but I think it was --

QUESTION: A rule 10 hearing is when he was actually sentenced. They didn't go from preliminary hearing to arraignment and then to sentencing here, did they?

MR. NORTON: No, this was a case in which --

QUESTION: This was telescoped.

MR. NORTON: -- the information was presented at the time of arraignment and it was previous to the --

QUESTION: And that's where the discussion of the Youth Corrections Act occurred by the United States Attorney?

MR. NORTON: That's correct.

QUESTION: So that --

MR. NORTON: And also by petitioner's own attorney.

QUESTION: Yes. So that there's no question that the subject matter of the Youth Corrections Act was brought to the attention of the judge at that time?

MR. NORTON: That's correct, no dispute.

The petitioner has referred to the fact that he was not advised by the judge at the time of sentencing about the possibility that, if he had been sentenced to treatment under 5010(b), he might be subject to commitment for up to four to six years.

Now, if he had in fact received such treatment, he might have an issue, but he did not, and that is not an issue that he has pursued in this case.

QUESTION: Yes, there is one case in the District of Columbia Circuit where, on a guilty plea, a sentence was imposed under the Youth Corrections Act, and it was reversed on appeal because it had not been disclosed to him that there was a six-year potential under that Act, as distinguished from --

MR. NORTON: Yes, in the Carter case, --

QUESTION: Is that Carter?

MR. NORTON: -- I'm aware of that; and the question there was really twofold: one question was whether the defendant had been informed of that possibility, and the

Court found that the record was not clear, and they sent it back for further determination. The other issue was -- it's rather a typical case, in that all of the litigation under the Youth Act, until very recently, presented a defendant who was sentenced under the Youth Act, complaining about it, saying that "I should have been sentenced under the adult provisions", because it might have been a misdemeanor, as in this case, subject to six months or three months or one year maximum.

And then they were subjected to a longer period.

On the question of whether an explicit finding must be made, let me correct the statement of what the government's position is.

We do not, in our brief, concede that it would be appropriate for the Court to impose a requirement of an explicit finding, as petitionerseeks, that the defendant will not derive benefit treatment under the Act.

What we have said is that if the Court were to require that there be some indication in the record that the Act has been considered, as there is in this case, then that is sufficient, and we would not oppose that.

But we do not agree that there should necessarily be any requirement of a formal finding, in the words of the statute, or in any other particular manner.

It may be sufficient if the pre-sentence report

indicates that possibility, or if it's referred to by counsel, or the judge makes some reference to it.

QUESTION: Is there any showing in the record that on the day of sentence the judge did or did not consider this, on that day?

MR. NORTON: Well, the -- yes, it was -- the proceedings occurred, if I'm not mistaken, on the same day. The arraignment and --

QUESTION: What time span was in that?

MR. NORTON: I'm not sure. There was --

QUESTION: The reason I'm asking --

MR. NORTON: -- a recess while he studied the pre-sentence report, and I'm just not sure how long.

QUESTION: Well, I still have grave problems as to whether he -- I mean I'm perfectly willing to assume he did. But wouldn't it be better if the record showed that "I have considered this, and I find that this man does not qualify for it, and therefore I'm not going to give it to him"; just one little sentence.

You don't even want to agree to that much?

MR. NORTON: Well, we -- we say that there may be -- there are reasons that such a requirement might be desirable; but, on the other hand, some courts have noted that there are reasons why it may be undesirable for the court to state --

QUESTION: Well, how do you show that he made a finding? How do you show that?

MR. NORTON: Well, just as you show in many other instances that a finding has been made, --

QUESTION: Like what?

MR. NORTON: -- where it is a precondition to further action.

QUESTION: Like what?

MR. NORTON: It is implicit in the alternative action taken by the court. Judges, no less than governmental agencies, are entitled to a presumption of regularity. And if they -- if this statute were to be construed as --

QUESTION: If we overdo that presumption of regularity in criminal cases, God help the Fifth Amendment.

MR. NORTON: Well, --

QUESTION: We look at it every day and examine it as to whether it's right or wrong.

Why do you object to the requirement, requiring the judge to say "I find that this man is not entitled to it"? Why do you object to that requirement?

MR. NORTON: Well, our position is not one of objection to such a requirement, necessarily. The position that we have --

QUESTION: Well, I thought here --

MR. NORTON: -- asserted here is that --

QUESTION: So would you object to it or not?

QUESTION: Well, I take it that you're not here to state whether you object to something or not, you're here to present the government's case and to answer argument about what the government's position is.

QUESTION: Well, what is the government's position as to whether or not the judge should make a finding, in quotes.

MR. NORTON: The statute provides that the judge has four options under the Act, and it is our position that Congress intended -- and this is amply demonstrated by the legislative history of the judges who proposed the Act -- that the judge would have complete discretion in determining how to sentence a youth offender. And that the use of the word "find" -- it's not "finding", incidentally, it's "find" -- "if the court shall find that the defendant will not derive benefit from treatment under the Act" was not meant to circumscribe in any rigid fashion the discretion of the sentencing judge.

That he had the same discretion that he has or had prior to the Act, to sentence a defendant.

The legislative history we think makes that abundantly clear. Now, we have set forth in our brief at some length the various comments of the sponsors.

QUESTION: So your answer is he's not required to

make a finding?

MR. NORTON: That's right. I was speaking only to the statement that we have made a concession. Our position is that the Act does not require any explicit finding on the record.

But we would not strongly oppose some procedural requirement to indicate for sure, just as prophylactic measure, that the Act has been considered.

But that isn't the heart of this case.

QUESTION: Now, which answer do I get? You said that you did not think he had to make a finding, and now you say he should.

MR. NORTON: Well, we're saying that in some cases it might be necessary to spell it out, and in others there may be other indications in the record that would make an explicit finding unnecessary.

QUESTION: Well, Mr. Norton, does this record show -- I'll go back to the question I put to you before -- does this record show that on the day of the hearing, which was both a hearing under Rule 10, or an arraignment, and a sentencing hearing, that, before the judge went out to read the pre-sentence report, both the prosecutor and the defense counsel had discussed and called to the court's attention the existence of the Youth Corrections Act?

MR. NORTON: The prosecutor had definitely, I am not

sure whether defense counsel's reference to it came before or after the recess.

QUESTION: But, anyway, it was before the judge pronounced the sentence that both --

MR. NORTON: That's correct.

QUESTION: -- both counsel had called his attention to this in oral argument.

MR. NORTON: That's correct.

QUESTION: I can't --excuse me.

QUESTION: Mr. Norton, in connection with that question from the Chief Justice, on page 13 of the Appendix, as I read it -- I wish you'd see whether this is right or not -- following the recess, and after the parties had come back into the court, counsel for the defendant, in the very last thing he said to the court after stating the extenuating circumstances, including the age and family situation of the defendant, concluded by saying: "And I would ask that he be placed under production -- on probation under the Youth Corrections Act."

And the court then proceeded with the formal sentence.

MR. NORTON: That's correct. And that was after the recess. The recess is indicated on --

QUESTION: That was after the recess, and prior to the recess the United States Attorney --

MR. NORTON: The prosecutor.

QUESTION: -- said to the judge, and this is on page 6, that you "may also be subject to the Federal Youth Corrections Act."

MR. NORTON: That's correct.

The recess is indicated at page 11, and then the sentencing followed immediately thereafter.

QUESTION: Wasn't that -- didn't we hear earlier that there was some misstatement that the Youth Correction Act had a maximen sentence of one year?

MR. NORTON: Well, --

QUESTION: I can't find that in the record here.

MR. NORTON: -- the statement was that the petitioner was asked if he was aware of the maximum penalty for the offense.

QUESTION: Yes.

MR. NORTON: And he stated, yes, it was one year. And that is true, the maximum penalty provided under section 844 for this offense is one year.

QUESTION: Yes.

MR. NORTON: He contended at a later point that his guilty plea should be set aside, because he was not then informed that, under the Youth Corrections Act, had he been sentenced under it, in lieu of imprisonment for one year under that penalty provision, he might have been subject

to treatment for up to anywhere from four to six years; where it may be a shorter period of time, but that is the outer limits.

That attack on his plea has since been abandoned.

Now, I'd like to turn to the, really a threshold question which is: Does the Youth Corrections Act limit or restrict the discretion of the sentencing judges.

As I indicated earlier, the legislative history of this Act, which was drafted by judges and supported in Congress by judges, makes perfectly clear that no intention to restrict the ordinary sentencing, through discretion of judges, was intended.

Judge Laws had stated, for example, that it would be purely optional, not an absolute mandate, the judges don't have to use it if they don't want to.

Judge Phillips, likewise, said that it was purely optional, and the judge would have absolute discretion in sentencing.

Similar comments abound, and we have set them forth in our brief at pages 16 to 24.

QUESTION: Well, I take it, then, Mr. Norton, -- or is this the government's position -- that you never get to any of these issues under (d) or anything else under the Youth Offender statute until the judge decides that he's going to sentence under the section.

In other words, what you've been saying to us is that the proponents of this legislation had no intention of stripping the judges of authority to sentence under some other panelty provisions if they didn't care to use this Act.

MR. NORTON: That's correct, and that's what subsection (d) does, it provides that --

QUESTION: Well, really, it seems to me when you parse this statute down, it appears that (a), which permits probation, the judge decides, Well, I'm going to sentence under this Act, but I don't want to sentence under (a), I don't want to give him probation, I think he ought to be incarcerated for treatment, and so I'll sentence him under either (b) or (c); and then (d) comes into effect, when he decides, well, maybe he wouldn't derive any benefit from treatment under (b) or (c), and therefore I can sentence under any other applicable penalty provision.

MR. NORTON: That's right.

QUESTION: Which would be under some other statute, or might go back to (a), the probation.

MR. NORTON: That's true. We don't think that --

QUESTION: Well, if that's so, Mr. Norton, it just strikes me that if the judge has the option to use this statute or not, you don't get at any of these questions until he decides he's going to use this statute.

MR. NORTON: Well, we don't see that you have to get into any of these questions at all. The way the procedural issues raised in this case have come up is because some courts, notably the District of Columbia Circuit, have read the Act differently than we read it. They say, as petitioner claims here, that it constitutes a binding mandate to the district judges, in sentencing youth offenders, --

QUESTION: Right. And if we don't agree with that position and agree with yours, that the judge was free to use this or not, and that on this record he decided he wouldn't use this statute, why isn't that the end of the case? Without ever getting to the question of whether there would have to be findings under (d) or not?

MR. NORTON: Well, that is our position, basically.

QUESTION: Yes.

MR. NORTON: But the case is -- the question presented is one of whether such explicit findings are required, and whether it must be accompanied by a statement of reasons.

The legislative hisetory again, and indeed the statute itself provides absolutely no support for the argument that this statute, when enacted by Congress in 1950, was intended to impose on sentencing judges any kind of procedural requirements at all.

Now, the use of the word "find" in subsections (b),

(c), and (d) is not equivalent to the use of the word "findings" in statutes pertaining to administrative agencies, or even in the provisions of the Rules of Procedure that say a judge must make findings of fact.

It is essentially the same as saying if the judge concludes, or is of the opinion, or believes that such-and-such is the case, then it may do this.

And again the use of the word "may" is crucial here. All of the options outlined in section 5010 have the word "may" in them. The judge "may do this", he "may do that", he "may do" a third thing.

It is not like some sentencing statutes, which have a clearly mandatory requirement. For example, in the narcotics addicts rehabilitation statute, which this Court considered in the Marshall case, there if the judg first takes the discretionary step of having a defendant who it believes may be an addict committed for treatment and gets a report on whether he might be subject to rehabilitation, then if the court determines that he is an addict and he might benefit from treatment for rehabilitation, then he shall sentence him to treatment. He has no discretion.

It is sharp contrast to this statute, which leaves all of these options open to the judges' discretion.

Now, the -- as I said, the D. C. Circuit has gone off on a different premise, and from that premise has said

that all of these procedural requirements of explicit findings, a statement of reasons, and appellate review, are essentially --

QUESTION: Was that the case where, on the record it appeared -- I haven't read that decision -- that it appeared that in fact the sentencing was under this statute?

MR. NORTON: No, the D. C. Circuit cases have all -- the recent ones -- have all involved adult sentences. Most of them have been robbery or murder cases. The defendant was sentenced as an adult, and appealed, either -- maybe on a guilty plea, so the sentence may have been the only issue before the court. And the court, in a series of decisions, has elaborated a series of rules, which now require that before a youth offender, which is anyone under 22, may be sentenced as an adult, or under any other applicable penalty provisions, the district judge has to make an explicit finding that he will not derive benefit from treatment under the Act, --

QUESTION: Well then, is that under an interpretation of this statute as the statute which must, if applicable, be used in sentencing a youth offender?

MR. NORTON: That's right. They have read the statute as mandating preferential sentencing under the Youth Offender statute.

QUESTION: I see.

QUESTION: Is that not the conflict on which, at least, --

MR. NORTON: That's correct.

QUESTION: -- certioari was sought, whether it governed our decision or not?

MR. NORTON: Yes.

QUESTION: That was the conflict raised in addition to cert.

MR. NORTON: That is the basic conflict between the court below and the D. C. Circuit.

They do not -- the D. C. Circuit, which was recently joined, on a prospective basis only, by the Second Circuit -- they do not suggest that the procedural requirements are called for by the statute itself. There is simply no language that they could base any argument like that on.

QUESTION: Has the Cambrell case, in the Superior Court of the District of Columbia, been reviewed by the local Court of Appeals? Do you know?

MR. NORTON: I don't know the current status, it probably would not have been decided by now, since it was in January only.

But what the Court of Appeals in the District has said is that you cannot sentence someone other than under

the Act unless you find that he's so incorrigible that he will not derive benefit. And then, in order to implement that mandate, they say that these other procedures follow.

Now, the drafters of this statute in 1950, I'm sure nothing could have been further from their mind than that in enacting the Youth Corrections Act they were imposing on sentencing judges an elaborate structure of required findings and statements of reasons, and now appellate review. Which, in the District of Columbia, has become very substantial. It is very difficult for an adult conviction to withstand the kind of analysis that --

QUESTION: And it's appellate review now in the District of Columbia Court of Appeals rather than the United States Court of Appeals?

MR. NORTON: No, this is in the U. S. Court of Appeals.

Recently, the District of Columbia Court of Appeals decided, in the Reed case, in December, Chief Judge Greene said that they would no longer adhere to the D. C. Circuit's rule as to appellate review. So that is only in the U. S. Court of Appeals.

But the Second Circuit has joined.

QUESTION: Well, how about requiring a finding?

MR. NORTON: Well, in that same case --

QUESTION: Hasn't that -- haven't they said they

will require a finding?

MR. NORTON: In the same case, the Reed case, Judge Reilly's opinion said that in some cases it may not be necessary for the judge to make an explicit finding, if, for example, he is called for a discretionary report concerning how to treat the defendant or how to dispose of the case, and if that report, under 5010 (e) recommends an adult sentence, because the defendant would not benefit, then in a case like that it is not necessary for the judge to reiterate that.

And he expressed some reasons why it might be detrimental if that were required. He pointed out that by not sentencing under the Youth Act, the judge does not turn his back on rehabilitation. That is a goal of all correctional institutions. It is of particular emphasis in the youth corrections system, but it is also a goal in other institutions.

So that you would disserve the potential for rehabilitation if you were to, at the time of sentencing, in effect, hit the defendant over the head with the judicial pronouncement that you will not derive any benefit from rehabilitative treatment.

So that they have, to a limited extent, departed in that respect from the D. C. Circuit rule.

QUESTION: Then is the decision which the judge

makes at that time, the choice of options, basically different in any way from the decision to place the defendant, a convicted person, on probation or not to place him on probation?

MR. NORTON: Essentially, no, in that this is a fundemantal distinction between this case and, say, the Specht case.

In any sentencing situation, the judge has to consider the potential for rehabilitation of the defendant, because probation, unless it's a case where there are limitations, but in the main probation is one possibility. Early release, early parole.

The elements that the judge takes into account are very similar, so that you are not, in this statutory scheme, calling upon the judge to consider factors that he would not ordinarily consider in sentencing an adult.

QUESTION: But when he sentences the defendant, after reviewing the pre-sentence report and hearing the right of allocation exercise, he imposes a sentence of two to six years by implication, he has rejected probation; is that not so?

MR. NORTON: That's certainly true.

Let me point out something else that stems from the D. C. Circuit reading of the statute, which petitioner supports.

If the statute were to be construed as giving the

judge discretion to chooce between the Youth Act and the other applicable provisions, only in the case where he finds the defendant is incorrigible and will not derive benefit, then, on the one hand, you have an absurd result, because only if you have someone who is incorrigible does the judge have the choice, as between Youth Act treatment and the other possibilities; but, in addition, you unduly limit the judge's flexibility because there may be other provisions which would be even more beneficial to the defendant than Youth Act treatment.

And this may well be such a case. This may be precisely what the judge had in mind.

Youth Act treatment involves the possibility of commitment and restriction on liberty for up to six years. This defendant, the petitioner, received a 90-day commitment to a jail type institution, --

QUESTION: He never was committed to the Attorney General? For that purpose.

MR. NORTON: For that purpose, no.

QUESTION: He was just put in a jail.

MR. NORTON: That's right. And the sentence was explicit, and this is under 3651, Title 18, followed by probation. Which, had he received the Youth Act sentence, he would not have had the same assurance, and the judge would nothave had the same assurance that after a dose of custody

he would be free.

QUESTION: Was this what the -- is this what the pre-sentence report recommended? Or do you know?

MR. NORTON: I do not know.

QUESTION: You don't know whether the pre-sentence report recommended treatment as an adult?

MR. NORTON: I'm not able to answer, I have not seen it.

Let me mention one other alternative that has particular application in this case.

Under 844, Title 21, the statute under which petitioner was convicted, the judge has the discretion -- this is a case of a simple possession, first-time offender, of a controlled substance. The judge has the discretion to sentence the defendant to probation for up to one year, and if the defendant satisfactorily completes that probation, then he is automatically entitled to have the proceedings set aside and completely expunged, for all purposes; a far more comprehensive relief than is available under the Youth Corrections Act. And it is mandatory.

In the present case, let's take petitioner's scenario, if this Court were to reverse and send it back for resentencing, if he were sentenced under the Youth Corrections Act, and if he received probation -- and we don't necessarily agree that that is the only alternative on remand -- but if

he did receive such probation, he would not be entitled to have his conviction set aside upon the completion of that probation.

The only time he can have it set aside is if the judge -- the court, in its discretion, decides to discharge him from probation prior to the term set, it's only for premature or early release that this remedy is available.

So it is not mandatory, as it would have been under 844. Yet, under petitioner's own argument, the District Court would have been disabled from sentencing him under 844 unless he first concluded that he was incorrigible, or will not derive benefit from treatment under (b) or (c).

Now, he might well have thought that, well, maybe he'll derive some benefit, but it's not worth subjecting him to the added risks of extended incarceration that would be involved.

QUESTION: Well, isn't it possible in this case, too, Mr. Norton, this was a young college student, wasn't it, in his second year in college?

MR. NORTON: That's correct.

QUESTION: The only time he had ever had any difficulty in his life.

QUESTION: Yes.

QUESTION: Isn't that right?

MR. NORTON: I am not sure about the prior record.

QUESTION: Well, as I see this record --

QUESTION: That's what the record shows.

QUESTION: -- I would suppose the judge would decide, I'll have to give him something, but I'll be as lenient as I can be; and so he gave him 90 days plus probation.

MR. NORTON: That would be my reading of the situation.

QUESTION: Otherwise, that this wasn't the kind of offender who ought to be or who needed to be sent to the custody of the Attorney General for treatment for four to six years.

MR. NORTON: That's right. In two more years of probation he would --

QUESTION: Under (b) or (c). Sure.

MR. NORTON: -- be -- after two years of probation he would be out of college and so forth.

QUESTION: What do you do about expunging his record?

MR. NORTON: Well, it is -- first of all, he would not be entitled to expungement as such, under the provisions of the Youth Act, unless he were discharged from probation or released from commitment prior to the term set. So it's really a matter of speculation whether that situation would ever arise, were he sentenced under the Act.

QUESTION: But it cannot be expunged under this present

sentence, short of a presidential pardon, I guess, can it?

MR. NORTON: Well, it is, I think I would have -- that is a question to which I am not prepared to answer. The words of section 5021, which provide for expungement, are -- simply refer to a youth offender who has been on probation.

In the structure of the Act, it appears to refer to probation under 5010(a), explicitly, it is not limited to that; and whether it would refer to probation under 3651, which petitioner received, is an open question, which I'm not -- this Court certainly has not resolved.

QUESTION: You don't know of any case where it was done, I'm sure.

MR. NORTON: I don't, but I'm not sure that there's any case that -- where it has been sought and denied.

I think some of the cases have assumed that 5010 -- that adult probation is not subject to the expungement provision. But I'm not sure that there's any clear ruling on that point.

QUESTION: About a thousand of them; a whole lot of cases on that.

MR. NORTON: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

Mr. Friebert, you appeared here at our request,

and by our appointment. I want to thank you on behalf of the Court for your assistance to the Court and to your client.

MR. FRIEBERT: Thank you.

[Whereupon, at 3:00 o'clock, p.m., the case in the above-entitled matter was submitted.]