ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner, --vs-- TED R. GRAYSON	NUMBER: 76-1572

Washington, D. C.
February 22, 1978

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UNITED STATES OF AMERICA, Petitioner	:	
v.	:	No. 76-1572
TED R. GRAYSON	:	

Washington, D. C.

Wednesday, February 22, 1978

The above-entitled matter came on for argument at 10:13 o'clock a.m.

BEFORE:

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

APPEARANCES:

WADE H. McCREE, JR., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530
For the Petitioner

JOHN M. HUMPHREY, Esquire, 23 West Third Street, Williamsport, Pennsylvania 17701
For the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 76-1572, United States against Grayson.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF WADE H. McCREE, JR., SOLICITOR GENERAL

ON BEHALF OF PETITIONER

GENERAL MC CREE: Mr. Chief Justice, and may it please the Court:

This case presetns the issue whether a United States District Judge, in imposing a sentence upon a convicted defendant, may take into account as one of the factors his belief that the defendant lied under oath at the trial.

The jurisdiction of this Court is pursuant to 28 U.S.C. Scection 1254 subsection 1 and writ of certiorari to the Third Circuit. The facts are not in substantial dispute.

The Respondent, Ted Grayson, was under confinement in the Federal Prison Camp at Allenwood, Pennsylvania since August 29th, 1975 under a three-year sentence for distributing a controlled substance. This is a minimum-security facility and is guarded only by a fence.

On October 11th, 1975, Mr. Grayson absented himself from his facilities and there is no dispute about this fact. He was apprehended two days later by agents of the Federal Bureau of Investigation in a New York City apartment where he initially denied his identity and subsequently

acknowledged it.

He was indicted by a grand jury in November, 1975 a month later, was tried in February, 1976 and was convicted by a jury on February 6th, 1976.

The jury obviously rejected his defense that he left under duress because of threats by another inmate, one Alex "Sarge" Barnes, to whom he claimed he was indebted to the extent of 40 cartons of cigarettes arising out of poker games losses.

On March 12, 1976, the sentencing judge imposed a sentence of two years consecutive to the sentence that the Respondent was then serving and the judge stated expressly that the reason for his sentence -- reasons for his sentence were to deter Respondent and others from similar conduct and secondly, and I quote, "It is my view that your defense was a complete fabrication without the slightest merit whatsoever."

A motion for new trial was denied. An appeal was duly noticed and a panel of the Third Circuit affirmed the conviction without opinion.

Upon rehearing, the panel reconsidered the case and in a split decision, vacated the sentence and remanded the case for resentencing, finding that the trial judge's consideration of the Respondent's lying on the stand was in conflict with one of its decisions, a case called Poteet versus Fauver and that, for this reason, the sentence was

tainted and could not stand.

The judge, concurring in the initial opinion for vacating the sentence, added the constitutional reasons that the holding or contrary holding would penalize the right of a defendant to take the stand, would deter other defendants from testifying and impose punishment for perjury, a separate or independent defense.

The dissenting opinion distinguished the Poteet case which was thought to govern, pointing out that in Poteet, after a jury conviction, the trial judge endeavored to cause both convicted defendants to confess their guilt. One of them did and received a particular sentence. The other persisted in his claim of innocence despite the jury's contrary verdict and the judge and the state court thereupon pronounced a considerably more severe sentence and this dissenting opinion in our case properly pointed out that the district judge here only sentenced him because of lying on the stand and not for his refusal to confess.

The dissent also observed that this was not a sentence for an independent crime but merely a consideration of the character or behavior of the defendant at the trial.

Interestingly enough, the dissenting opinion suggested two limitations on the consideration of a defendant's mendacity at trial.

First, that the trial judge should be convinced

beyond a reasonable doubt of the lying under oath and second, that the falsity of the testimony should be necessarily established by the finding of guilt. He had no difficulty with either condition in this case and would have affirmed.

It is also interesting that neither of the judges who voted to vacate the sentence had any difficulty with the fact that the testimony was false or that it was necessarily established by the finding of guilt or if they did, they certainly did not express it in their filed opinions.

This question has been considered by all the circuits and all but the District of Columbia Circuit, until this case from the Third Circuit, had held that a trial judge may consider the fact that a defendant lied under oath in determining the appropriate sentence, so long, of course, that the sentence does not exceed the permissible limits established by statute.

This is consistent with the expression of the Congress. In 18 United States Code Section 3577 we find the Congressional statement and I quote it, it is brief, "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

And this statute is found in that portion of the Code that provides for the obtaining of a presentence report

as a sentencing tool available to the district judge who must pronounce sentence and I emphasize the Congressional use of the word "conduct of a person convicted" and certainly, lying under oath at the trial is an act which might fall under the classification of conduct and the Court, of course, witnesses this himself and the statement that no limitation should be placed on the information would certainly seem to legitimatize the Trial Court's action here, unless there is some constitutional reason why he may not do it.

We submit that there is no constitutional reason. There -- as the dissenting opinion pointed out -- is no punishment for a separate or independent offense. The offense of perjury is a separate and independent offense but it carries a sentence of five years and this sentence was within the permissible limits for the sentence of escape from confinement and was not because -- it was not an additional penalty but merely a consideration of an appropriate sentence as demonstrated by the conduct of the defendant who appeared before the Court.

QUESTION: Mr. Solicitor General, if the position of the Third Circuit were sustained and -- would there be a tendency, at least in some cases, for the prosecution to institute a new case, a new indictment for perjury and if that were so, might not the defendant be worse off than having the judge merely take it into account?

GENERAL MC CREE: Indeed, he might be and I think my brother might want to respond to that. He might want to consider his position here. I would say, indeed he would be and a pro pos of this point, whether this is punishment for a separate offense, I don't think anyone contends that the sentencing court may not take into consideration the fact that a defendant has a prior conviction.

Let us assume that Respondent here had a prior conviction for bank robbery. Certainly, the sentencing court could take that into consideration in formulating the sentence for escape and yet --

QUESTION: It could take into consideration the fact that he had been previously indicted for bank robbery, could it not? Even though he had not been convicted?

GENERAL MC CREE: Yes, Your Honor, or even arrested and not indicted and in Williams versus New York, this Court in 1949, I believe, indicated that the fact of an arrest or indictment could also be taken into consideration as having a tendency to reveal something about the background, character and conduct of the defendant.

QUESTION: And that would also be true if the judge had not said -- given his reasons.

GENERAL MC CREE: That is very true, Your Honor and this is the trouble that I have with the decision of the Third Circuit. The district judge here, in utter candor, in

expressed candor -- because he said, "I am saying this while I pronounce sentence so if I am wrong, a reviewing court can tell me that I am wrong"and if he were denied the right of considering the mendacity of the defendant, he might just say nothing and pronounce the same sentence and it would not be reviewable by any court because no one could speculate why he did it.

Now, I am not suggesting that a judge would be dishonest about it if this Court should say that he could not consider it, but it would certainly be a temptation not to explicate reasons and I might observe that the Senate Bill 1437, sometimes referred to as the "Son of S1," a previous Senate bill that was proposed in an earlier Congress that will amount to a revision of the criminal code requires the explication of reasons for sentences that, apart from presumptive sentences that are to be established by a mechanism set forth in that proposed legislation and this would mean that a judge desiring to depart from a presumptive sentence, could not take into consideration the fact that the defendant lied in his presence under oath in the courtroom at a time when he might be expected at least once to have respect for the process of justice.

Another contention that we would like to make is, in many states, juries sentence: In fact, perhaps in as many states as they do not. I should have that number for the Court

and I can furnish it if the Court wishes.

If this is, indeed, a constitutional limitation, if the sentencing agency may not take into consideration the fact that a defendant lied, then a sentencing jury could not take this into consideration, either and we would have the anomalous situation of a jury rejecting a defendant's defense because it found it incredible beyond a reasonable doubt and then having to disregard its determination in deciding what disposition to make of the defendant and we submit that that kind of anomalous situation is not good constitutional sense or good common sense and that this decision of the Third Circuit should be reversed.

If there are not other questions at this time, with leave of Court, I would reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Solicitor General.

Mr. Humphrey.

ORAL ARGUMENT OF JOHN M. HUMPHREY, ESQ.

ON BEHALF OF RESPONDENT

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

The 1949 decision of this Court in Williams versus New York was the reflection of the concept of individualized sentencing and that case placed a particular emphasis on the

need for a sentencing judge to consider a variety of factors which would relate to a defendant's need for and prospects for a rehabilitation.

Therefore, the Court held that a judge without due process safeguards can consider such characteristics of a defendant as past criminal conduct even if that conduct had not resulted in a conviction.

QUESTION: Justice Black, in that opinion, indicated very clearly that hearsay could be relied upon, did he not?

MR. HUMPHREY: That is correct, Your Honor.

QUESTION: Would not the personal observation of a judge in the courtroom be more trustworthy and material than the hearsay information which necessarily comes into a presentence report?

MR. HUMPHREY: The government has contended that this would make the determination by the judge more accurate, the fact that he was there and observed the testimony.

We would contest that position for a variety of reasons.

First of all, as it pertains to perjury, perjury is an inherently difficult crime to prove. It has historically been subject to the so-called "two witness rule, unlike other crimes" and as this case illustrates, the particular factual situation in this case, really, we are dealing here with a

conflict between the testimony of two convicted felons.

The judge happened to believe the testimony of the government inmate witness but it is our position that -- and I will discuss this in just a moment, that in fact, the jury's determination of guilt in this case was not at all inconsistent with the defendant's testimony.

QUESTION: What if the -- hypothetically, the presentence report showed that of 20 or more persons interviewed by the probation officer, a dozen of them said that this man was unreliable, untrustworthy and known to be a man who constantly dealt in falsehoods? Could the sentencing judge take that into account?

MR. HUMPHREY: Your Honor, I believe that he could.

QUESTION: Under Williams.

MR. HUMPHREY: Under Williams. And even under our position in this case because that, presumably, would be conduct which was a reflection of the defendant's character generally outside of the unique pressures of a criminal trial and we think that this is a crucial difference in this case.

QUESTION: Just what do you mean by the "unique pressures" in the context of your sentence, as you stated it to us?

MR. HUMPHREY: Well, a man who has been convicted of a -- or, who is guilty of a serious criminal offense, it would not be surprising that this type of man would generally

lie andattempt to avoid the hardships of incarceration.

We think that a criminal trial itself places a unique pressure on a defendant.

QUESTION: Well, one of the pressures it places on him is that he takes an oath to tell the truth, the whole truth and nothing but the truth, isn't it?

MR. HUMPHREY: That is correct, Your Honor.

QUESTION: Well, do you think that that cuts in your favor?

MR. HUMPHREY: No, we are not excusing perjury.

We are not attempting to say it is okay for a defendant to commit perjury. Perjury can be punished. A defendant who commits perjury on the stand can be charged and convicted for perjury.

QUESTION: Well, then I'll put to you the question I put to the Solicitor. Do you think -- is it in the interest of your client to have the government be required by this Court to prosecute him separately for the perjury?

MR. HUMPHREY: Indeed, I think it is in the interest of all the defendants that the government be required to charge and to try a defendant whom they suspect of perjury.

We would have no --

QUESTION: That would be the only way -- or, at least it would be one way to discourage perjury other than giving heavier sentences, wouldn't it?

MR. HUMPHREY: That is correct and --

QUESTION: Do you suggest that would be good for defendants generally?

MR. HUMPHREY: I would say that Mr. Grayson would much have preferred to have been charged and been given the opportunity to persuade a jury that he did not get convicted of perjury, rather than have a judge make a summary determination and impose an additional increment of sentence without any due process safeguard whatsoever.

QUESTION: I find it difficult to square that with the idea that you concede that the Court may take into account the hearsay statements of a dozen people outside that he is a liar.

MR. HUMPHREY: Well, again, those kinds of statements go to a defendant's character outside of the context of the criminal trial.

QUESTION: Well, yes, but what if the probation officer interviews the defendant after a conviction, which would be the normal procedure? And he writes down in his report, "I've talked to him and asked him all sorts of questions and he continually lied to me. I just couldn't get anything out of him. He lied to me." And he writes it in a probation report and the prisoner knows as well as anybody that that presentence report is going to the judge.

Now, could the judge consider that report?

MR. HUMPHREY: I believe he could, Your Honor. Again --

QUESTION: Well, that is not outside the context of a criminal trial. As a matter of fact, it is awfully close to immediately preceding the sentence.

MR. HUMPHREY: Well, it is not in the trial situation and in that particular case -- well, one of the problems we have with a judge considering perjury is that it tends to kill the right of a defendant to testify in his own behalf.

QUESTION: Well, what you are saying is that the Court in a sense can take into consideration the fact that the defendant has lied on other occasions but on the one occasion he took an oath to tell the truth, it can't take into consideration the fact that he thought he lied.

MR. HUMPHREY: That is right, because -- and for the several reasons, one, that a defendant is under unique pressure in a criminal trial.

Two, that the consideration of a judge of that factor tends to kill the right of other defendants to take the stand and testify, even giving a truthful testimony.

QUESTION: How is any other defendant going to get any less pressure? I am very interested. You know, he is under more pressure than anybody else.

MR. HUMPHREY: This particular Respondent is.

QUESTION: No, any defendant is no more in trouble

with perjury than any other witness.

MR. HUMPHREY: That is correct, but if --

QUESTION: Now, if he could testify without taking an oath, he would be in pretty good shape --

MR. HUMPHREY: That's correct.

QUESTION: -- like they used to do in Georgia.

MR. HUMPHREY: That is right. As they do, apparently under the Continental system, still.

QUESTION: No, in the Continental system they have to find out how he was not guilty because he starts out guilty so let's don't get into that.

MR. HUMPHREY: All right.

QUESTION: Here's my problem -- along with my Brother White's question. If the presentence report says that this man was arrested for perjury, could the judge add two years on that?

MR. HUMPHREY: Yes.

QUESTION: And the difference between that and this is what?

MR. HUMPHREY: The difference is -- well, if the presentence report says that he was arrested for perjury and some other precedent, then that would not -- the judge could consider --

QUESTION: That he committed perjury while being tried for another offense.

MR. HUMPHREY: Yes, I believe the judge could consider that.

QUESTION: And the difference?

MR. HUMPHREY: And the difference is that in this particular case, the defendant, in choosing whether or not to take the stand, if the Court upholds the government's position here, a defendant will be chilled in choice of --

QUESTION: Yes, he could be chilled in committing perjury. Is that bad?

MR. HUMPHREY: No --

QUESTION: If he is persuaded not to commit perjury, is that bad?

MR. HUMPHREY: Well, of course it is not bad.

QUESTION: Is that bad?

MR. HUMPHREY: If that is a purpose of the sentence, I think it is an improper sentence because --

QUESTION: Well, do you think that this man will again deliberately commit perjury at a trial?

MR. HUMPHREY: Well, we would contest he has committed perjury in the first place.

QUESTION: Well, do you think he will commit it again?

Well, do you think he will think about it next time?

MR. HUMPHREY: Well, of course, I am sure that he

will think about it the next time.

QUESTION: That is right.

MR. HUMPHREY: Well, that is the purpose of the sentence that indicates that the judge was sentencing him for the purpose of deterring him from commiting perjury.

QUESTION: Which is what the judge said he was sentencing him to deter him from escaping.

MR. HUMPHERY: Well, he said that one of the reasons for his sentence was deterrence but if the reason we are sentencing is to deter defendants from committing perjury, then we are in fact sentencing them for the subsequent crime of perjury.

QUESTION: Well, I don't know where you get "we." I'm not in this. I'm not sentencing. You want to sentence? You go ahead.

MR. HUMPHREY: If a judge were to sentence him on that basis, then --

QUESTION: Well, you agree that he could -- if the presentence report said, "Remember, Judge, when he was being tried before you last month, he committed perjury and, indeed, he was indicted for it," not convicted, he was indicted for it. He was charged with it. The judge could take that into consideration.

MR. HUMPHREY: Well, I would say that, yes, if it was not in the context of this criminal proceeding before the

judge --

QUESTION: But it was a similar one, the week before.

MR. HUMPHREY: If it was the week before, yes. If it was not this particular criminal proceeding.

QUESTION: I see. All you want is that in this particular proceeding, because this man is subject to perjury, he cannot be considered for sentencing.

MR. HUMPHREY: Well, that is one of the reasons. I think that there is a temptation for a judge to sentence him or to increase the increment of sentence because of suspected perjury because he wants to either punish the individual for falsely testifying in his court or because he wants to deter other defendants from doing so and not --

QUESTION: And he can't do it for either reason.

MR. HUMPHREY: No, I don't believe he can because that would, in effect, be a sentence for the substantive crime of perjury without having been charged --

QUESTION: Well, when he raises it because the presentence report says that this man was arrested for murder three years ago in Guam, can the judge consider that in the sentence?

MR. HUMPHREY: Yes, he can. Williams would say that he can.

QUESTION: Well, how can he punish him for that

murder in Guam?

MR. HUMPHREY: Not punish him. In that case --

QUESTION: Well, there's a difference. Why is it not punishable there?

MR. HUMPHREY: Okay. There are four recognized purposes of sentencing, protection of society, deterrence, punishment of the individual and rehabilitation.

The government has contended in its brief that in eight courts of appeals which have decided this issue in favor of the government's position, all reject the concept that this is a punishment or a sentence imposed for deterrence and that it is for rehabilitation.

Similarly, a consideration of a murder in Guam three years ago -- or the charge that he murdered -- would be relevant only to the question of that defendant's need for and prospect for rehabilitation. He cannot punish him for that.

QUESTION: Well, I question whether -- at least, I would agree with that characterization. I would think that many a trial judge who was sitting as a sentencing judge and reads, as my brother Marshall has indicated, in the presentence report that the man was convicted or indicted for murder in Guam, charges dismissed three years ago, indicted for an armed bank robbery two years ago, charges dismissed -- increases the sentence not in the hope of rehabilitating the

man for these things because most sentencing judges do not even mention the fact but simply because he figures this man is a bad apple and he is a worse apple than the conviction for this particular offense indicates.

MR. HUMPHREY: Well, I think that that is the same thing that I am talking about. You see, looking at the character of the individual -- and he says that as the result of the fact that this guy is a bad apple as shown by his murder three years ago, then he should be incarcerated for a longer period of time because it would take a longer period of time to rehabilitate him or he can't be rehabilitated and therefore we have got to keep him in.

And Williams, when it talks about these various kinds of sentencing factors, talks in terms of rehabilitation.

If you look at the character of the man, you cannot punish him for a crime that he has not been convicted for.

QUESTION: Well, Williams wasn't dealing with rehabilitation because the decision based on hearsay evidence, hearsay material in the probation report led to his electrocution, so there was no rehabilitation.

MR. HUMPHREY: Well, this is a lack of possibility of rehabilitation, perhaps.

QUESTION: Going back to Mr. Justice White's question, the setting that he suggested, you referred to the unique pressures under which your defendant suffers when he

is on trial.

After the conviction, I suppose those pressures have not gone away, have they? After the conviction and before the sentence.

MR. HUMPHREY: Well, perhaps, you know, he is still under some pressure, yes. I was talking about the trial situation and the --

QUESTION: But what if the sentencing day comes and the judge wants to know from the defendant if he has anything to say, giving him his right of elocution and he elocutes, he talks at great length and the judge says, "Well, you are just lying," and in his sentence, "I think you have lied right here before me. Of course, you weren't under oath but you were lying" and he says, "I am going to increase the sentence for that reason." Would that be permissible?

MR. HUMPHREY: That is a closer case one because he is not under oath and therefore apparently would not be subject to a perjury conviction. However, I would --

QUESTION: But the pressures must be there.

MR. HUMPHREY: I would take the position that in that particular case the judge should not consider it because, again, it would chill the right of the defendant to elocute and the -- first of all, perjury I do not think is that relevant to the question of rehabilitation because of the fact that it is not --

QUESTION: And the fact that he is under oath or not is not that relevant to whether the judge should be able to take it into account, is it?

MR. HUMPHREY: Well --

QUESTION: It is the fact that he is a congenital liar that the judge takes into account, whether it is under oath or not.

MR. HUMPHREY: I think that, you know, the judge can take into account the fact that a man is dishonest but in this particular context, in trial, for the variety of reasons, the chilling effect upon his right to testify, the fact of the unique pressures that the defendant is under, I do not think that he should consider this.

We are not saying that it is going to go unpunished. He can be punished for it. But in this particular context, it is improper.

QUESTION: What if the judge, like the judge in this case, said, "There is in the presentence report a good deal of information that is hearsay saying, this man constantly spreads malicious rumors about his neighbors. This is maybe an undesirable characteristic but it does not influence me in sentencing.

"Nonetheless, when he exercised his right at elocution, as in Mr. Justice White's hypothesis, he lied before me and I regard this as a frustration of the judicial process

which I am going to take into consideration to add to the sentence."

Would you think the judge could do that?

MR. HUMPHREY: Well, it depends. If he is doing it for the purpose of punishing this man for doing what he is doing, or telling the judge falsehoods or if he is doing it for the purpose of deterring that individual or other individuals from doing likewise, I don't think it is proper because he was not charged and convicted of any crime and to punish him or to attempt to deter others from that conduct without the charge and conviction, I do not think is proper.

However, if he says that is a reflection of the man's character and his needs for and prospects for rehabilitation, it is a close case.

As I said, the fact that he is not under oath may distinguish it from the case that we have at bar here because he would not be subject to other punishment without the charge and conviction.

QUESTION: Do you know whether the proposed new criminal code touches on this question?

MR. HUMPHREY: Well, the new proposed criminal code in the very first section of it, sets forth the reasons for sentences. Section 101 subsection B says --

QUESTION: Does it require a statement of reasons?

MR. HUMPHREY: Yes, it does.

QUESTION: Yes.

MR. HUMPHREY: Furthermore, it states in Section 101 B4 that one of the purposes of sentencing is to promote the correction and rehabilitation of persons who engage in such conduct, recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation. The whole concept of individualized sentencing has undergone quite a reevaluation, at least here.

QUESTION: But it does not forbid taking into consideration the character of the defendant.

MR. HUMPHREY: Well, no. In fact, specifically, it has a section there very similar to the statute 3577.

QUESTION: Yes.

MR. HUMPHREY: Which would permit it but then it says, really, rehabilitation is not a goal that is being served by incarceration of the defendant.

I wanted to point out at this time something about the facts in this case, just to illustrate the problems created by this practice. Here is a defendant who denies that he committed perjury and they have a jury verdict which was not inconsistent with his testimony, despite the contentions of the government and the statements of the dissenting judge in the court below.

The defendant testified that he was being pressured by an inmate because of this gambling debt, that he left

because he was afraid of getting killed and he went to his apartment, his legal residence in New York City and was apprehended by the FBI a couple of days later.

The judge, in charging the jury on this defense of duress and coercion, stated that there must be no reasonable opportunity for the defendant to have avoided the compulsion without committing the crime and charged the jury that they must apply a reasonable man's standard.

Therefore, it is obvious that the jury could have said, "This man was under duress. He did feel that his life was in danger but a reasonable man would not have taken the action he took. A reasonable man would have gone to the authorities at the Allenwood Prison Camp and asked for their protection."

QUESTION: Mr. Humphrey, would you make the same basic argument that you make in this case if the jury verdict were inconsistent with the defendant's testimony?

MR. HUMPHREY: I would make the same basic argument, Mr. Justice, on the constitutional point. I think that this case can be decided without reaching the constitutional question. I believe that if the Court recognizes the difficulties which this particular practice creates, I think the Court can exercise its supervisory powers over the Federal Court and impose, for example, those --

QUESTION: Mr. Humphrey, supposing we had a case

in which the defendant had not taken the witness stand and the trial judge before sentencing said to his lawyer, "You know, if I had heard this witness -- heard this man on the witness stand, I might have decided the case differently on the merits" and the lawyer had said, "Well, he could not take the stand because to deny the charge he would have had to tell the truth." I mean, telling the truth would have hurt him and he did not want to lie so he stayed off the witness stand.

Could the judge take into consideration in sentencing him that this man had been sufficiently interested in veracity not to take the stand and try to defend himself falsely?

MR. HUMPHREY: I suppose that the judge could take that into consideration. I have never seen any case where that has been discussed or whatever, but I --

QUESTION: I am sure it happens quite often, aren't you? Don't you think there are a lot of defendants who don't take the stand because they just do not want to lie?

MR. HUMPHREY: Well, there may be an appreciable number. I would say that they do not represent the majority. I was in Court yesterday for arguments and Mr. Justice Marshall indicated that it was ordinary or usual for a defendant to "misremember" events and I think that is the usual thing. When we are dealing with men who have committed serious crimes, lying to avoid incarceration is not something that is

unusual.

QUESTION: Well, you are making a presumption that everybody who is tried is guilty.

MR. HUMPHREY: No, I am certainly not. One of the points in our argument is that those not guilty will be dissuaded, perhaps, from taking the stand and testifying in their own behalf because of this very practice.

If an individual knows that he has got a close case and he knows that all the judge has to do is disbelieve him and he is going to get twice the sentence that he would normally get, that is going to weigh heavy on the minds of an appreciable number of innocent defendants.

QUESTION: You mean, an innocent defendant will not take the witness stand?

MR. HUMPHREY: That's right. I believe that there is pressure even without -- if we leave this issue aside, there is pressure on an innocent defendant to plead guilty because of the plea-bargaining system. If he can get a sure six months --

QUESTION: Well, plea -- don't bring plea-bargaining in on this case. We have enough problems here now.

MR. HUMPHREY: Okay. But the point I am trying to make is that that pressure exists already and when you throw this into the pot for consideration, not only is he going to get --

QUESTION: The judge is required to ignore the fact that this man had deliberately lied to him, just ignore that.

MR. HUMPHREY: That is right, for an imposing --

QUESTION: That is hard to do.

MR. HUMPHREY: That's true. It is hard to do and that is one of the problems. There is a tremendous limitation --

QUESTION: Well, the problem is two-sided. You do not seem to recognize the other problem. Part of the problem is that one way of stopping all this is not to lie on the witness stand.

MR. HUMPHREY: That is correct.

QUESTION: That is one way of stopping it.

MR. HUMPHREY: That is certainly correct and as I stated, an individual is subject to punishment for that. We are not saying it is okay but when a judge, again, does it because he wants to punish that man or he wants to deter others, then he is in fact sentencing him for the substantive crime of perjury.

QUESTION: Just like he sentences him for the crime of murder in Wong.

MR. HUMPHREY: Yes, and I believe that that is an -- improper --

QUESTION: But that is all right.

MR. HUMPHREY: No.

QUESTION: Oh, no, you said that was all right.

MR. HUMPHREY: Only if it reflects upon his character and need for --

QUESTION: I thought you said that in this very case, if the presentencing report said this man was arrested for murder in Guam three years ago, the judge could consider that?

MR. HUMPHREY: That's right. I stated that he could not consider it if he was imposing sentence for punishment or to deter other robberies.

QUESTION: My question is, in this very case, if the judge had said, "The presentencing report shows that you were arrested for murder in Guam three years ago and I am taking that in consideration in this sentence," that that is perfectly all right?

MR. HUMPHREY: It is all right, as I stated, if it relates to his character --

QUESTION: No, no. Don't add anything to it. In this very case would it be all right or not?

MR. HUMPHREY: Your Honor, I have to add a qualification. It is not all right generally. It is not right to be punishing him for that --

QUESTION: Obviously, he could not be arrested for murder in Guam while testifying in the United States, so I mean that's true.

MR. HUMPHREY: Right but it is not this --

QUESTION: You can consider everything except perjury.

MR. HUMPHREY: Yes, it is not this judge's function to punish for other criminal conduct. Only when that criminal conduct reflects upon this man's character and need for or prospects for rehabilitation.

QUESTION: Mr. Humphrey, you were court-appointed by the District Court?

MR. HUMPHREY: That is right, Your Honor.

QUESTION: By Judge Muir himself.

MR. HUMPHREY: That's right.

QUESTION: And you had been his clerk.

MR. HUMPHREY: That is right.

Thank you.

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

Do you have anything further, Mr. Solicitor General?

REBUTTAL ARGUMENT OF WADE H. McCREE, JR.,
SOLICITOR GENERAL OF THE UNITED STATES, ON BEHALF OF PETITIONER

GENERAL MC CREE: Mr. Chief Justice, with the leave of the Court, I would waive the balance of my time.

QUESTION: I have a couple of questions, Mr. Solicitor General.

GENERAL MC CREE: Yes, sir.

QUESTION: There is, as I am sure you would

concede, an absolute constitutional right to plead not guilty to any criminal charge.

GENERAL MC CREE: I do.

QUESTION: There is also an absolute constitutional right to -- for a defendant to take the witness stand in his own defense in any criminal trial.

GENERAL MC CREE: That is my understanding, too.

QUESTION: Now, if after the defendant has exercised both of those constitutional rights and he is found guilty, that is, he has pleaded not guilty and he has taken the stand and he has testified in a manner that if his testimony is believed, he has a defense to the criminal charge so if he is found guilty, the natural inference arises that he has lied, does it not?

GENERAL MC CREE: It might.

QUESTION: That the jury has found that he has lied, does it not?

GENERAL MC CREE: Certainly in this case.

QUESTION: If his testimony is a complete defense to the charge.

GENERAL MC CREE: Certainly --

QUESTION: And if the jury finds him guilty then the inescapable inference arises that the jury has found that he has lied.

GENERAL MC CREE: Inescapably.

QUESTION: And if the sentencing judge then takes that into consideration in posing the sentence, isn't that exacting a penalty on the exercise by the defendant of his right to plead innocent and his right to take the stand in his own behalf?

GENERAL MC CREE: It could be so construed, but I would not so construe it. It would be considering this person's preparation for being rehabilitated. It would be considering his character as the Court decided what disposition to make of him.

If it was for the purpose of punishing him, I would take it an indictment would --

QUESTION: If he had pleaded guilty or if he had not taken the stand, there would have been no possibility of the judge in this trial, as the result of his conduct in this trial, to have found that he lied.

GENERAL MC CREE: That's correct.

QUESTION: In the courtroom.

GENERAL MC CREE: He could not have lied on the stand if he didn't take it, certainly.

QUESTION: Right. So even if he had pleaded guilty or he had pleaded not guilty and he had taken the stand, the judge could not possibly have found, resulting from his conduct during the course of this trial, that the defendant had lied, could he?

GENERAL MC CREE: But when the Court is given discretion to make the appropriate disposition of a defendant who has been found guilty, he must necessarily be permitted to take into consideration factors like the character, behavior and the conduct --

QUESTION: We would all agree with that and that is what the Williams case held.

GENERAL MC CREE: And to say that he would have to ignore the fact that he took his oath -- that he disregarded a solemn oath in court but could consider the fact that he had lied out of court when no oath had been imposed would just be an impossible conclusion.

QUESTION: Except I wonder how you deal with cases like the United States against Jackson?

GENERAL MC CREE: Well, perhaps my answer is something like this. He is also subject to indictment for perjury and --

QUESTION: And in order to be convicted he has to be first of all indicted and then -- unless he waives indictment and then found guilty without a reasonable doubt and he has a presumption of innocence.

GENERAL MC CREE: That is so but the fact that he can be indicted for perjury also can be an inhibiting factor on his taking the stand but we don't -- for that reason -- forbid an indictment for perjury.

QUESTION: Or a conviction.

GENERAL MC CREE: Or a conviction.

QUESTION: If he has been convicted and then indicted and the claim is that his testimony at trial, in order to prove his innocence was false.

GENERAL MC CREE: That is correct.

QUESTION: Mr. Solicitor General, both of you are talking about rehabilitation and I am struck with the fact that how do you rehabilitate a man who, during his rehabilitation, gets in debt by 40 cartons of cigarettes for playing poker?

And that is his own testimony. How can you rehabilitate him?

GENERAL MC CREE: Well, I suppose -- I don't know how you can rehabilitate him and I would say that if he wants to add to his penchant for gambling, his disregard for his oath, then he is even further removed from the possibility of redemption.

QUESTION: I could not find it here in my notes -- did the judge say "perjury" or did he say "lying and fabricating"?

GENERAL MC CREE: He said "lying."

QUESTION: He did not use the word "perjury," did he?

GENERAL MC CREE: I am not aware that he used the

word "perjury." That is right, Your Honor.

If there is nothing further, we would concede the balance of our time.

Thank you, Your Honors.

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

[Whereupon, at 10:58 o'clock a.m., the case was submitted.]