ORIGINAL

In the

Supreme Court of the United States

JACQUELYN E. HUNTER, Petitioner,	)	
v.	)	No. 77-6248
GERALD WALLACE DEAN, SHERIFF, Respondent.	)	

Washington, D. C.
October 11, 1978

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Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

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Petitioner :

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GERALD WALLACE DEAN, SHERIFF :

Respondent :

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Washington, D. C.

Wednesday, October 11, 1978

The above-entitled matter came on for argument at 2:39 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the Supreme Court
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:

JAMES C. BONNER, JR., ESQ., 475 North Lumpkin Street Athens, Georgia 30601; on behalf of the Petitioner

G. STEPHEN PARKER, ESQ., Assistant Attorney General of Georgia, 132 State Judicial Building, 40 Capitol Square, S. W., Atlanta, Georgia 30334; on behalf of the Respondent

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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 77-6248, Jacquelyn E. Hunter versus Gerald Wallce Dean, Sheriff.

Mr. Bonner, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES C. BONNER, JR., ESQ.

ON BEHALF OF THE PETITIONER

MR. BONNER: Thank you, Mr. Chief Justice and may it please the court:

The facts in this case are relatively simple and pretty much undisputed. I will go over them briefly and then we will launch into all the multi-faceted issues that this case presents.

Jackie Hunter and a co-defendant were convicted on guilty pleas of a burglary charge down in Terrell Superior Court down in South Georgia near Albany. They were each sentenced two years probated provided that each pay fines and costs and attorneys' fees that amounted to some $250.

The co-defendant's family was there in court. He paid the fine reasonably promptly or they paid the fine. It is not clear or either relevant I guess who, but in any event he was released.

Jackie Hunter, when the trial judge inquired of her whether she could pay a fine, had indicated to him that she thought so and named two cousins --

QUESTION: Did she think so that she thought so?

MR. BONNER: Well, she said, yes, sir, but I do not think I am mischaracterizing it to put it that way. I think this whole episode has to be viewed as a typical one and that is when a defendant is appearing for pronouncement of sentence, I think always --

QUESTION: Well, she certainly did not use those words.

MR. BONNER: No, sir, she did not, but I think the gist of them are that. I am not sure that that is important either. But in any event, she did indicate that she could pay a fine. When the judge inquired further, she named two cousins that she was going to look to pay the fine.

QUESTION: Has any explanation ever been tendered to the court why this was not done?

MR. BONNER: No, sir. No explanation was ever tendered but, of course, there is no dispute that they did not pay the fine.

QUESTION: No, but has there ever been any explanation from her about her representation to the court?

MR. BONNER: Subsequently, two weeks after the sentence was passed and it became apparent that her hopes or expectations or whatever they were not going to come to pass, she sued out a writ of habeas corpus in the Terrell Superior Court with volunteer counsel. The hearing occurred

before the trial judge which is not normally -- it would simply be a coincidence under Georgia law. Also coincidentally it occurred within the term of court, when he still had plenary power over the sentence in all respects.

But in any event, at that particular hearing which I do not believe is part of the record before this Court, there was no testimony taken. The parties just simply proceeded on the basis that she was in jail because she had no money. There was detailed explanation made at that time, no inquiry even made at that time as to why the cousins had not paid, or even what basis she had had for making that original statement.

QUESTION: Mr. Bonner, may I ask you a question about the fine? The notice of statute provides -- there is a proviso in it that provided such defendant shall not be entitled to any rebate or refund of any part of such fine so paid in case such probation shall be revoked by law.

MR. BONNER: Yes, sir.

QUESTION: Is it fair to infer from that if the defendant had paid the fine, had been put on probation and served it without any wrongdoing, that at the expiration of the period of probation the fine would have been repaid to her?

MR. BONNER: No, sir, that is not correct. I think that this might be a misimpression that inadvertently arose from one of the State's arguments; that is, that the fine is somehow at stake.

It is not of stake in a positive sense because the fine, once paid,is lost. Even successful completion of probation, even if she had been discharged as a model citizen after one year would not have resulted in that money being refunded. To this degree it does represent -- there is an added risk, I might add here, that an affluent defendant faces when he pays the fine immediately and hits the street.

If Jackie Hunter, for example, had been given leave to pay her installments and had violated her probation after two weeks, the relative amount of money she would lose would be -- she would not have lost the $250, probably only just a small part of it.

QUESTION: But what if she had been sentenced to pay the fine in installments, which she was conceivably able to pay at the time the sentence was imposed and then four months later she defaulted on an installment and offered testimony on habeas that she simply was not able to financially pay that installment?

MR. BONNER: Your Honor, that obviously is a question that arises out of this.

QUESTION: What is your answer to it?

MR. BONNER: It is not our case.

QUESTION: No, but what is your answer to it?

MR. BONNER: Well, I do not think there is any doubt that having been afforded a fair opportunity to pay the fine

in installments that her probation could be revoked if she failed to do it. Now obviously we are talking about a gray area. There is a very large gray area here because it is obviously a very easy question if she willfully fails to pay the fine, if she has squandered a fair opportunity to make installments payments; it is quite another end of the spectrum if she goes out and pounds every door in the County looking for a job and she cannot get one.

But I think that that particular kind of question is probably going to be buried in the proper use of the Court's discretion when it is faced with a revocation petition if one is every filed on that particular ground. And it did not, your Honor; one may not ever be filed on that particular ground because her probation officer may understand what efforts she is making and simply not prefer those kind of charges.

QUESTION: But does that not suggest that there is a point in time at which the court has to make its decision and that the factors that go into the constitutionality of its decision has to be judged as of that in point in time rather than four months later or six months later?

MR. BONNER: I am not sure if I fully understand what you mean.

QUESTION: Well, supposing in this case that the trial judge was assured by her --now the record is apparently muddy and you claim otherwise -- that she was able to pay the

fine or someone would pay it on her behalf. And he therefore quite consciously decided, "I will suspend the imposition of sentence and impose a fine on you." Now can she come in four months later and say, "Well, I know the representation was made at the sentencing that I could pay the fine, but in fact I could not have paid it then." Is that grounds for relief?

MR. BONNER: Yes, sir. I think that is a fair characterization of what happened here, according to the view the State takes, but, yes, I think that would be grounds. I think she would have the same kind of claim.

The question which would be before the court, writ of habeas corpus, is whether she is being confined essentially for failure to pay money. And I think once you have got that, you enter into the full panoply of equal protection consideration arises.

But let me run back just a minute to the question that you asked me -- we were talking about the gray area. What I want to avoid is the impression -- there is no part of my argument that says that Jackie Hunter cannot be locked up if she cannot pay the fine.

QUESTION: Right at the time of the sentence?

MR. BONNER: I am sorry.

QUESTION: Right at the time sentence is imposed. A judge can look at a wealthy defendant and say, "I fine you $1,000." He can look at an indigent defendant convicted of the same offense, pleading guilty of the same offense and say,

"I know you cannot pay any fine so I am going to sentence you to ten days in jail."

MR. BONNER: Yes, sir, that would be perfectly appropriate, because obviously if we did anything else, we would immunize Jackie Hunter possibly from any punishment. And that is not our claim.

QUESTION: Would not the record have to show also some finding or some consideration of whether she could pay it in installments?

MR. BONNER: Well, I suppose a proper inquiry would involve that. If the judge is thinking in terms of a fine at all as a precondition or condition of probation or anything, it would be common sense --

QUESTION: What if he says, "I am thinking of a $500 fine. Can you pay it?" She says, "No, I have not got $500, but I am quite willing to try to work it out." And he says, "Well, if you cannot pay it, go to jail."

MR. BONNER: I think you have got the same case we have here. We have an equal protection problem.

Now, Your Honor, we have that particular kind of case here. I mean, we would have that particular kind of case in the hypothetical you gave simply because in that case as in this case, based on that colloquy, we would have the poverty factor, the preconditioned payment, isolated and highlighted as the sole feature on which liberty or not turns. That is the

unique feature of this case. It is not going to exist in a normal case.

In a normal case when a judge is passing sentence -- and incidentally I want to stress too that we are not making any suggestion at all that the judge should not consider or should not be aware of economic status. It is our position that the more he knows about that defendant, the wiser and better his judgment can be. But he has got to treat that fact, like race, as Justice Jackson said in Edwards versus California as a neutral fact, one that is neither the source of rights nor basis for --

QUESTION: Mr. Bonner, I do not understand how you can give the answers you did to both Mr. Justice White and Mr. Justice Rehnquist. With respect to Mr. Justice White, I thought you said that if she came in and said -- it will be $500 and she said I think I can pay it, but then it turns out she cannot, he cannot put her in prison. Is that not what you said?

MR. BONNER: She would have the same equal protection claim, yes, sir.

QUESTION: But then to Mr. Justice Rehnquist you said if you had one rich defendant who could pay $1,000 and a poor defendant who cannot pay anything, he -- I do not understand the difference.

MR. BONNER: Well, you are hitting -- if a judge is

faced with two comparably situated co-defendants, one is rich and one is poor, there is no requirement that he impose the same sentence. As a matter of fact, in all probability --

QUESTION: But the only reason the poor one goes to jail is she cannot raise any money.

MR. BONNER: Well, here we are getting into a question of -- it is a different question here. The judge may very well decide that $1,000 fine will be sufficient to punish the relatively affluent defendant. He may decide that a fine -- you know, the poor co-defendant who can pay no fine should also be punished but, obviously, perhaps there are difficulties in punishing through a fine -- or him through a fine and, therefore, he could impose a term -- obviously, if it is ten days, it is a very simple question.

QUESTION: This case is very simple. The only reason the person goes to prison is because the person is an indigent.

MR. BONNER: I think that illustrates how poverty has to be -- how it can be considered, how it has to be considered in molding whatever the appropriate punishment is.

QUESTION: Well, is not just what the judge did here? He said if you can raise $165, you get probation; if you cannot, you go to jail.

MR. BONNER: Well --

QUESTION: Suppose the judge to both parties said

$1,000 or 1,000 days, and one of them is Mr. Onassis who just died and the other is a sharecropper? You do not have any problem?

MR. BONNER: No, sir. Obviously, you have got the same problem that we have got here, I think.

QUESTION: So you do have a problem?

MR. BONNER: But what you are talking -- we are talking about a question of degrees. I think in the hypothetical that you posed we have a judge who is looking at the co-defendants. He wants to punish them, say, comparably. And I do not think anybody can come in and claim, "Hey, wait a minute now, a real comparable punishment would have been to lock him up for one day and not ten or for two years." I mean, you get into a question where you are quibbling with considerations that only a trial judge can make.

Now again any time -- the problem with posing hypotheticals is is that any hypothetical you give, it is easy to isolate an economic factor in a way that similar -- to the way it is isolated here.

QUESTION: But here he obviously tried to treat these two people equally. I do not know how it could be more plain.

MR. BONNER: Well, in a way he did, but again the $1,000 fine for Onassis and --

QUESTION: Well, let us keep it to the 165 then. If you can ever put a person in jail because of indigence and

that is the only reason, why can you not do it here? That is really the heart of the case and I do not quite understand.

MR. BONNER: Well, no, Your Honor, I am not saying -- I did not mean to suggest that you could ever -- I suppose we get back to Justice Rehnquist's question.

QUESTION: Yes, you do.

MR. BONNER: There may be a point when she is exposed to jail because of her indigency -- you know, talking about not the gray area but the black and white area where she willfully fails to get a job and make the payments.

QUESTION: Well, let us assume it is always non-willful. Let us put willful cases all to one side -- just the inability to pay, can that ever justify a jail sentence? I think you said yes.

MR. BONNER: Yes, sir, it can, if it is treated as a neutral fact and if it goes --

QUESTION: Was it not treated as a neutral fact here?

MR. BONNER: No, sir, it was not. Indigency was made the sole condition on which her going to jail and staying free turned.

QUESTION: Well, if it can be an ingredient, then inevitably it can sometimes be the controlling condition?

MR. BONNER: Yes, sir, I think sometimes it can be, but in a normal case we will never know, because in a normal

case or whatever judgment is passed, it is going to be weighed and balanced against a multitude of factors and we will never be able to go into that. Even the question of proof aside, we would never be able to go into that and say this man got this particular sentence because he was black or poor or rich or had blue eyes, something like that.

QUESTION: Well, since we are dealing with hypotheticals, and you have just mentioned the rich, suppose the judge has a man before him who is a multimillionaire and at the end of the evidence he finds him guilty and says, "I observe that you have been found guilty now for the third time, driving while intoxicated, endangering people's lives and each time we have increased the fine. Very clearly fines are no deterrent to you. You cannot be punished by fines because you have so much money." And he puts all of this on the record.

"I am going to send you to jail for 30 days." Now the decision there is because he is so rich --

MR. BONNER: Yes, sir.

QUESTION: Do you find something wrong with that?

MR. BONNER: No, sir. That obviously is a common situation and there is something quite right with that. What is right with that is that the judge has used that economic factor rationally. Obviously, it is very rational in the hypothetical you gave. That is the problem essentially with the use of it here.

The State justifies the use of this exclusion for poverty -- for one, well, basically, for a multitude of reasons. They say this reflects the family support; it reflects their control; it reflects an ability to live without creating further offenses.

That is where the argument basically fails against the traditional test of showing a rational connection. They have used -- they have taken the fine and they have used it here as a blunderbuss. Instead of making the specific inquiries in what control is the family going to offer, what kind of support are they going to give, is she going to be able to live a life without crime, they have taken one factor, whether she can pay a certain fine period and they have used it as a substitute -- as a very crude and clumsy substitute for these things that ought to be precise, careful evaluations.

QUESTION: What if the judge had determined that this person could not have paid any fine in installments or otherwise and faced right up to it that the person is really indigent and could not pay as hard as she tried --she is just disabled, for example -- and said, therefore, two years in jail. You would still be here, would you not?

MR. BONNER: No, sir, we would not be here.

QUESTION: Well, why would you not?

MR. BONNER: Well --

QUESTION: Why would you not have required the judge

to say instead of an automatic two years --

MR. BONNER: We would have no way of saying that two-year sentence was not an appropriate punishment. We would have no launching pad here, you know, to bring us here.

I think in what you outlined, we would have a case where the judge would probably exercise his discretion. Now again maybe fundamentally we would have somebody who was in jail because of the neutral fact that they cannot pay or they cannot be punished any other way, but we cannot launch ourselves into this -- we should not launch ourselves into this inquiry into what role all this played and how it is going to fit in with, say, her prior record and this kind of thing.

On the face of it that would look like an appropriate sentence, we would have no claim. Now again that illustrates the problem with a hypothetical. When you give a hypothetical, it is very neat and simple to say -- to isolate that economic factor on through. And I think any time you have got that, then the position that I am taking is somewhat contradictory.

QUESTION: No part of your argument is that there is hardly any relationship between two years in jail and $165 in terms it is serving the State's penalogical interests.

MR. BONNER: Yes, I think here what we have got --

QUESTION: Well, are you arguing that or not?

MR. BONNER: I am sorry. No. It is not a relativity argument. I admit we would have difficulty on our habeas hearing

the judge had come back and said, "Okay. Well, if you cannot pay a fine, I sentence you to one year and eleven months" or something like that. We can run into some problems at that particular extreme.

The critical thing here, what we are talking about -- you know, it is a very modest modification of that particular requirement in order to give this defendant the choice that is open to an affluent co-defendant under the same sort of sentence.

And again I want to stress that we are not saying that the judge should be blind to economic condition any more than he should be blind to the color of the man who stands in front of him or the sex of the person who stands in front of him. These are things that the judge is going to know.

QUESTION: One second. The question I started with about the proviso in the statute about money being paid back.

MR. BONNER: Yes, sir.

QUESTION: You said it is not normally the case that the fine is refundable. Is it ever the case in your case?

MR. BONNER: As far as I know, Your Honor, that statute controls and it is never refundable.

QUESTION: The proviso is just really meaningless then, is it not?

MR. BONNER: Well, it means that once the money is paid in, it sticks.

You could serve two years less one day and if you paid the whole fine --

QUESTION: But the proviso is it will not be revoked if probation is -- I mean, it will not be refunded if probation is revoked, which gives rise to the suggestion that it would be refunded if probation was not revoked.

MR. BONNER: That is not simply --

QUESTION: The inference is not -- the fact is otherwise.

MR. BONNER: If you browse through the Georgia Code --

QUESTION: The other possibility is that they were just saying that we can punish you not only by a fine but by imprisonment because the inference might be that you can only be fined or imprisoned. If I break probation and am sent to jail, I should get my money back.

MR. BONNER: Yes. I think it is to head off that argument exactly, but as far as I know, none of that money is ever refunded. If the State of Georgia gets it, it has got it.

Now this does point a disparity, I suppose, between the affluent man who pays his money right away and then stands two years of risking losing it all than somebody who is on an installment payment who might only lose part of it. I think that is a de minimus disparity and I think, you know, to countervail against the man who is able to pay all the fine at one point has that one condition that he does not have to worry about

throughout his probation; the indigent on the installment program, although he may end up saving money that he does not have, you know, by not paying it because he is locked up, nonetheless has to suffer under that condition.

As I say the basic point I just wanted to make is that we fully agree that any kind of decision to probate -- and this is part of the State's argument -- is necessarily a delicate one and one that should be taken with great care. Our point is that when it is made to turn solely upon poverty on a financial consideration, then it simply is not rational. That kind of judgment is again a blunderbuss. It is no substitute for the kind of evaluations that the State claims that it stands for.

Here, for example, if the judge had decided that Jackie Hunter should not be on probation because her family was going to provide a negative influence on her, you know, maybe the poverty of the family and so forth would play some role in all that and he had not put her on probation, we would not have a case.

I mean there again the judge would have made a specific evaluation -- a specific judgment and we could not impeach it; we could not get beyond it, even though, you know, poverty may have played some particular role in it in an unhypothetical way.

Once we get into a hypothetical situation, then we are

exactly where we are here because we can take that one factor and we can track it all the way down and we can play with it and see how it may have been used rationally.

But in a normal case we are not going to have that particular opportunity. We are going to have to presume that whatever weight the judge gave to it was a proper weight, like race. Certainly any judge who can see is going to be aware of the race of the defendant in front of him and that might mean something in some context.

QUESTION: Mr. Bonner, if you prevail here, it is likely that Georgia will enact restrictive legislation and call for mandatory prison sentences?

MR. BONNER: There has been some movement in that direction, Your Honor, but I do not think that is any chance at all. I might say here as a practical matter that not all probated sentences pass this way or are enforced this way. And a great majority of them that have fine conditions accommodate that particular problem, particularly in the Atlanta Metropolitan area and some of the other metropolitan areas, but I am not sure whether they do this -- you know, I am not sure just whether they are operating under that --

QUESTION: Well, sometimes one can win a case and lose a lot more in the long run.

MR. BONNER: I do not believe here, Your Honor, that there is a risk of that. What we are asking for is a slight

accommodation of that sentence, a very modest accommodation of that sentence -- modification of that sentence and one that in practical matters is quite commonly --

QUESTION: What are you asking for?

MR. BONNER: We are asking basically, Your Honor, that she be given an opportunity to pay that fine in installments, in reasonable installments. And we would have no objection too if the State wanted to -- there is no reason why the installments should stretch over the entire 24-month period either. It is all a question of what is reasonable, but we have no objection if she is required to pay them off relatively early in the probation.

QUESTION: Do you suggest that we can at this stage determine the terms of --

MR. BONNER: No, sir. This again is something that a trial judge, you know, would have to look at. Obviously, he is going to have to evaluate her employment potential, the job market possibly in the area, a variety of things like this and determine what is reasonable.

QUESTION: Is there any theoretical difference between paying it at once or paying it in installments as far as the legal theory is concerned?

MR. BONNER: You mean the penalogical theory or something?

QUESTION: Well, the legal theory.

MR. BONNER: I see no problem with the fine at all as a penalty. You know, I think the only problem here is that indigency has to be accommodated when a judge in the name of the state decides that a money payment and probation will satisfy the penological interest of the state.

But I do not see -- I think Justice Harlan's concurring opinion in Williams made the point that the effect of a fine is liable to be its pinch on the purse rather than the manner in which it is collected. And I do not see any problem with that. If I have any time left, I will try to save it.

QUESTION: Let me ask one more question. I am sorry. In your habeas corpus petition did you tender an amount that you said your client could pay or did you ask for release?

MR. BONNER: Your Honor, I did not draft that petition, but I think the prayer was for release outright.

QUESTION: Is there anything in the record to indicate that your client could pay $25 immediately?

MR. BONNER: No, sir. The inquiry never got into that final stage because what had happened in this particular case is that the court basically adjudicated on the basis of the prior decisions in the State Supreme Court on just the naked legal issue. That was the Calhoun and the Barnett case.

The hearing was really -- if you call it a hearing, it is sort of in quotation marks because there was no evidence taken; there was no proffer of anything like that. It was a

summary type of thing, more legal argument.

Let me save the balance of my time if I have any.

MR. CHIEF JUSTICE BURGER: Mr. Parker.

ORAL ARGUMENT OF G. STEPHEN PARKER, ESQ.

ON BEHALF OF THE RESPONDENT

MR. PARKER: Mr. Chief Justice and may it please the court:

The overriding issue in this case is whether or not it is constitutional for a state trial judge to condition probation upon pre-payment of a fine where the defendant represents to the court that he or she is able to pay a fine, but subsequently is unable to pay the fine and for that reason is not allowed to serve the sentence on probation but rather is incarcerated.

An underlying issue is whether or not trial judges should be able in the exercise of their vast, although not unlimited, discretion to consider the financial resources available to a defendant in determining whether or not he is a good risk for probation.

The petitioner in this case appeared in the Superior Court of Terrell County December 1976 after having been indicted with one other person for a residential burglary. As Mr. Bonner has recited, the pleas of guilty were entered at that point. The trial judge turned his attention to the question of what an appropriate sentence would be.

Upon inquiry, petitioner responded affirmatively that she would be able to pay a fine and that a cousin would be probably called upon to help her with that. The trial court then posed a two-year probated sentence or two year sentence on each defendant to be probated upon the condition that each of them pay a fine of $165 plus court costs.

Subsequently, the additional portion of that -- the money for the attorneys' fees was stricken with the trial court after the habeas corpus hearing. The co-defendant was able to pay his fine and released; the petitioner, however, did not pay her fine and remained incarcerated. She had been on a personal recognizance bond for the duration of this habeas corpus proceeding.

In the petition for habeas corpus which was filed in the Superior Court of Terrell County there was a hearing held at which there was no evidence introduced other than the transcripts of the prior proceedings. Now at that hearing -- and I would like to point out to the Court that the transcript of that hearing only very recently became available to the parties and at the time the briefs were filed in this case that transcript was not in fact available.

But what that transcript does reflect is that at that hearing there was an assertion by her attorney that he believed that she could pay the fine in installments. There was, however, no testimony by petitioner in this regard. He did not avail

himself of the possibility of calling her as a witness in this habeas corpus proceeding, which, of course, could have been done under the Georgia habeas corpus statute.

QUESTION: I missed what you just said. He did not avail himself of --

MR. PARKER: In other words, Your Honor, the attorney -- a different attorney who represented her at the habeas corpus hearing could have put her up there on the stand and have her testify --

QUESTION: But instead just relied on the record in the trial court?

MR. PARKER: Yes, sir. He just more or less argued the law. He maintained that he believed that she could pay a fine in installments, but there were no specifics and she offered no testimony.

I also would point out at this habeas corpus hearing that the State stipulated that she was an indigent at that point in time.

To the extent that we did not have that transcript, there is an error in footnote 4 of our brief which states that the installment issue was not raised until appeal. Our brief was in error on that one point.

QUESTION: How did the point get up that she could not pay it? You said there was no testimony.

MR. PARKER: Well, she remained incarcerated as a

result of her failure to pay and then at the hearing the attorney who represented her at that time advised the court that she could not pay. And that is when he also advised the court of his belief that he thought she could pay on the installment payments.

QUESTION: And under Georgia law at that stage the judge could have altered the sentence?

MR. PARKER: Yes, sir, he could have. Under Georgia law the judge who imposes the probated sentence maintains control over that sentence for the term of probation. Otherwise, he would lose it at the end of the term of court.

Now we have not disputed petitioner's assertion that the equal protection clause applies to judicial action as well as legislative ones. However, I believe it is important to point out this distinction and to point out the fact that the basic statutory scheme which authorized the sentence in this case has not been challenged at any time by the petition.

This court in this case today is not reviewing the application of a statute challenges unconstitutional, but instead is being asked to declare unconstitutional an act of individual judicial discretion in sentencing.

QUESTION: Do you understand this attack by your brother to be solely under the equal protection clause of the Fourteenth Amendment, not under the due process clause?

MR. PARKER: I understand it that way, Your Honor.

QUESTION: Perhaps you should be the one to tell us, but that is my understanding too.

MR. PARKER: Yes, sir. Our understanding is the equal protection clause and nothing more.

QUESTION: Mr. Parker, does Tate versus Short have any relevance to her problem?

MR. PARKER: Your Honor, it certainly has relevance, but we certainly believe as to the Georgia Supreme Court that the facts of that case distinguish it primarily because --

QUESTION: Well, I think there we have a Texas statute, did we not? We had an attack on a statute.

MR. PARKER: Yes, sir, in both that case and also Williams versus Illinois there were statutory provisions in question which authorized the specific sentence in that case.

And as I stated in this case we do not have a challenge to the statute, but rather just to the judge's action in conditioning probation upon pre-payment of the fine.

As we noted in our brief, and I will not belabor the point, the decisions of this court have not treated indigence as a suspect class for purposes of equal protection analysis in each and every case. For this reason we contend that even though this case arises in the criminal justice system that the test of strict scrutiny is not the applicable test but rather the rational basis test is the applicable test.

The question is whether there is a rational basis for

a trial judge to consider a defendant's economic status in determining whether he is a risk for probation.

Recent decisions of the court have underscored this point in cases such as the San Antonio School District case, more recently the abortion case in Maher versus Roe. These decisions all involved legislative or administrative classifications but they did make clear that the mere fact that the impact of a challenged statute or regulation does fall most heavily upon the indigent is not sufficient to constitute discrimination against a suspect class.

Now the petitioner contends that there is a distinction between cases involving public funding of schools, welfare and related programs and between cases arising under the criminal justice system, such as this case. There is some support for that argument. The footnote in the Maher versus Roe opinion indicating that the principles of Griffin versus Illinois have not been applied to legislative classifications generally.

But I would also point out to the court that there are contrary indications such as the language in the San Antonio School District case in which the very cases of Tate versus Short and Williams versus Illinois were discussed at some length by the court in the majority opinion, and the opinion that flatly stated that although judges often do consider a defendant's ability to pay a fine and imposing a fine --

QUESTION: Why does Georgia provide legal aid?

MR. PARKER: Well, Your Honor, Georgia provides legal aid in order to provide the assistance of counsel at trial --

QUESTION: You recognize that there is a group that needs it?

MR. PARKER: Yes, sir, there is a recognition of that need.

The discussion of the Tate case and of the Williams case which is contained in the San Antonio opinion pointed out or stated in dicta admittedly that in imposing fines judges are guided by sound judicial discretion rather than constitutional mandates.

There are, in fact, a number of cases within the criminal justice system in which this court has refused to apply a strict scrutiny test in an equal protection analysis. For example, in the Ross versus Moffitt, the Court's 1974 decision in which it was held that the equal protection clause nor the due process clause -- neither of them required the state to appoint counsel for indigence on discretionary appeal after direct appeals had been exhausted. There was reference in that case to the other decisions outside the criminal law area in which indigence had not been considered a suspect class.

I would submit that Ross versus Moffitt is a recognition by this Court that it is not possible to have absolute equality within the criminal justice system. There are other

cases. For example, the Court rejected an equal protection challenge in a case involving a New York statute setting parole eligibility and clearly favoring those who had been --or discriminated against those who had been unable to make bond prior to their trials. An equal protection argument was summarily rejected in that case, McGinnis versus Royster. ..

I would also point out that an examination of a case such as Griffin versus Illinois and its progeny reveals that the court had in fact invalidated statutes and practices in which it placed the indigent at a disadvantage in the criminal justice system for no rational reason. The lack of a rational reason, I submit, is a compelling factor in all of those cases.

For example, in the Griffin case the courts found, and I think very directly, that there is no rational relationship between the defendant's ability to pay costs for an appeal in advance and his guilt or innocence. There just could not be any relationship and for that reason and others the Illinois requirement was struck down, the irrationality simply being the fact that the merits of a post-trial motion is in no way related to a defendant's financial status.

QUESTION: I take it your submission is that 30 days or $30 is always a good sentence, and if the indigent -- and if a person is indigent and cannot pay the $30, 30 days is always valid?

MR. PARKER: No, sir, that is not our position at all.

QUESTION: What is it? You have not said yet.

MR. PARKER: Well, our position, Your Honor, is that it is permissible for a judge to impose probation and to provide as a condition of that probation that a fine be paid.

QUESTION: In a lump sum?

MR. PARKER: In a lump sum.

QUESTION: So that you either pay in a lump sum or you have the specified time in jail?

QUESTION: Regardless of the amount?

MR. PARKER: Well, Your Honor, there certainly are limitations on what a judge can do. In fact, the Georgia Supreme Court's opinion --

QUESTION: Well the statutory limitations in Georgia obviously?

MR. PARKER: Yes, sir, and due process limitations as set forth by --

QUESTION: Well here it was within the statutory --

MR. PARKER: Yes, Your Honor. The judge could have fined her up to $2,000.

QUESTION: And the jail?

MR. PARKER: Well the statute which provides that a fine may be imposed as a condition of probation provides that the fine can be up to $2,000.

QUESTION: If probation is revoked, then what happens?

MR. PARKER: If probation is revoked, then the

defendant would get credit for the time spent on probation.

QUESTION: I know, but what is the jail sentence under Georgia law for this case?

QUESTION: What was it in this case?

MR. PARKER: Two years. The crime for which she was indicted carried a one to 20 year sentence. In this case she received a two-year probated sentence.

QUESTION: Right. So it was well within the statutory limits of the jail sentence?

MR. PARKER: Yes, sir.

QUESTION: And you would say that the judge could say to the defendant either pay the fine. You have violated probation. Now either pay the fine in a lump sum or go to jail. And the defendant says, "I just cannot pay it in a lump sum."

MR. PARKER: Well, at that point, Your Honor, I think it is --

QUESTION: I can pay it in installments.

MR. PARKER: At that point, I think it is a matter for the court's discretion.

QUESTION: But it would not violate the constitution, you say, if the judge said awfully sorry, but either lump sum or nothing?

MR. PARKER: We contend that it does not violate the constitution for the judge in the exercise of his sentence and discretion to impose a lump sum payment upon an individual and

to condition their probation upon them being able to pay their fine.

QUESTION: Could the judge have sentenced her, say, to the 20 years period?

MR. PARKER: Yes, Your Honor. The plea of guilty was to the crime of burglary and the crimes does carry a sentence from one to 20 years in this case.

I would like to use the balance of my time for our basic arguments about sentencing discretion and, hopefully, cover some of your questions, Justice White, of what our position is with regards to what the judge can or should be able to do.

Let me just first state three basic propositions which we are advocating with regard to the judge's sentencing discretion.

First of all, we contend that it is not constitutionally required -- it should not be required to -- the court should not be prohibited from considering a defendant's financial status and all other relevant factors in determining whether he or she is a good risk for probation.

Secondly, we contend that the trial judge in assessing the sentence or determining what appropriate terms of probation would be should be allowed to rely upon the defendant's assertion that he or she will be able to pay a fine. Now, in this case I would point out that the defendant was represented by appointed counsel, and there is no challenge to counsel's

competence and no challenge to the voluntariness of the guilty plea.

QUESTION: Well, he did not say she could pay.

MR. PARKER: No, Your Honor, she said she could pay; he did.

QUESTION: Well, where did she say it?

MR. PARKER: Well she did not say it in response to the amount that was given but she said she could pay a fine without responding to the amount. And there is no indication that counsel was dereliicting his duty.

QUESTION: She said she thought her cousins would.

MR. PARKER: Yes, sir. She said she --

QUESTION: That is a lot of difference in saying I will pay, unless she has got cousins that are different from my cousins.

QUESTION: Did she not say categorically, yes, she could pay. And then when the judge took a further step, the judge said how are you going to pay it and then she said my cousins will pay it.

MR. PARKER: That is correct, Mr. Chief Justice. The judge did not simply rely on her assertion that she could pay. He asked her how she could pay.

QUESTION: You do not know what the judge relied on, do you?

MR. PARKER: No, sir. I only know what is in the

record.

QUESTION: Well, quote to me, what did he say in the record that he relied on that?

MR. PARKER: To be verbatim, he said: "Jacquelyn, how can you pay a fine?" And at that point, she responded with the statement.

QUESTION: No. The statement was you said relying on that.

MR. PARKER: I apologize for any presumption.

QUESTION: You can assume that. You can assume he relied on it, but you do not know.

MR. PARKER: Yes, sir, that is true. But the point that I was trying to make was that where a defendant is represented by counsel and indicates to the court after having been advised by counsel and after having entered a plea of guilty that she can in fact pay a fine, then it should also point out that there was no effort made to withdraw the guilty plea at that time -- at least the record reflects no complaint of any type, the value of the sentence or the fine or any other aspect of the case.

Our position as to allow the sentencing court to consider all pertinent factors is very consistent with what this court has decided in numerous cases such as Williams versus New York, a 1949 case in which the court stated emphatically that under the modern philosophy of penology, the punishment

is supposed to fit the offender and not merely the crime. Now the rationale of that decision was recently reiterated by the court in the decision handed down on June 26th of this year after the filing of our briefs, United States versus Grayson, in which the majority of this court held that -- upheld the action of a federal trial judge who had stated on the record that he had given a particular defendant a longer sentence because of his personal belief that the defendant had lied on the stand while testifying on his own behalf.

The Grayson court concluded that the defendant's truthfulness or mendacity was relevant to his prospects of rehabilitation as a reflection of his attitude towards the cite.

The facts are obviously quite different, but we submit that under the rationale of Grayson and similar cases that to allow a sentencing judge to consider, along with many other factors, the financial resources available to a defendant in the event he has sentenced a probation as constitutional and is in fact desirable.

Now we do point out in our brief that in probably the majority of cases would not even be a germane factor. And some cases, very serious crimes, would not be any factor at all to consider, but nevertheless the courts should not be deprived of the opportunity to recognize that someone is perhaps a better risk for probation because of their ability to pay a

fine into the court under such circumstances as the court dictates.

To ignore the factor would in fact be to ignore reality and I believe an example of the reality of that is that since 1945 the Federal Rules of Criminal Procedure have provided that a pre-sentence investigation shall contain information about a defendant's financial condition, along with the many other factors.

The decision to grant probation is, in fact, as difficult or perhaps more difficult than a decision of what number of years to give one who is going to be incarcerated has great consequences for the defendant, obviously, and also for society. We submit that the trial judge should not be encumbered in carrying out this very difficult function.

QUESTION: Did you say earlier that the petitioner here is actually out on her own recognizance during the pendency of the proceeding?

MR. PARKER: Yes, sir. She was granted a personal recognizance bond of some type by the U. S. District Courts of the Middle District of Georgia, and I believe that occurred after a federal habeas petition was filed. The petition was held in abeyance pending exhaustion of state remedies, but she was out on this --

QUESTION: So she is still out right now then?

MR. PARKER: Yes, sir, as far as I know, she is.

QUESTION: How much time had she served before she was released on this personal recognizance?

MR. PARKER: The guilty plea was entered on December 13th; the habeas corpus hearing was on February --

QUESTION: What year was that?

MR. PARKER: I am sorry, 1970. She had served about two months when the habeas petition was brought. I would say she probably served about three months because I do not know when the federal habeas petition was filed.

QUESTION: So this is affirmed that she will now have to go back to serve the 21 months?

MR. PARKER: Well, she would have to serve the balance of her sentence, I believe.

QUESTION: Well that would be 21 months, would it not?

MR. PARKER: Well, yes, sir, whatever she had not served.

QUESTION: Well I thought you had said she served three months?

MR. PARKER: I am sorry. She would have to serve whatever -- she would get credit for whatever she had served, but I do not believe that under the Georgia statute she would get credit for the time on the personal recognizance bond pending the proceeding.

Therefore, she would probably serve about ten or eleven more months and that she would -- of a two-year sentence

she would probably serve about 14 months of it, right.

But one more point that I would like to make about the sentence itself is that there is no reason for the court to feel that it was unreasonable when he imposed the penalties which could have been inflicted for the crime, coupled with the statements by the defendant as to what she would be able to do, and coupled with the fact that it really was a fairly modest fine. All of these factors make the court's action look reasonable and certainly does not appear to have been an abuse of the trial judge's discretion in that regard.

QUESTION: One other small question: If during this period that the case had been going on she was able to earn $165 and save it and she tendered it to the State judge at this stage, I suppose she would get probation, would she not?

MR. PARKER: I would say in practice, Your Honor, she would. I think that would be the case. I do not know if it would be required as a matter of law that I personally know of cases where that very thing happens.

QUESTION: Has any tender been made?

MR. PARKER: As far as I know, Your Honor, none whatsoever.

In conclusion, I would like to make two or three points as to what we feel would be the practical consequences of a reversal of the Georgia Supreme Court's decision -- at least, any reversal on the merits.

First of all, I think that it is fair to say that there will be at least a certain number of persons who will be incarcerated rather than having been given an opportunity to pay a fine. I think Justice Blackmun's concurrent opinion in the Tate versus Short case implied this and I think that would be the case if trial judges were to come to the conclusion that it really was not safe to fine anybody because at some point in time then he or she could come back in and say they were not able to pay it.

I think that that would probably lead to a greater number of sentences of incarceration and that would obviously not be in the interest of the state or the defendants. It would have possible implications in other areas such as the trend toward restitution in criminal sentencing. Restitution is a type of sentence which is used a good bit down in Georgia and elsewhere.

And I believe that a reversal of what the Georgia Supreme Court said in this case could adversely affect that trend toward restitution as a part of criminal sentences.

In conclusion, we urge affirmance of the Georgia Supreme Court's opinion and we contend that reversal of it would seriously curtail the sentencing discretion of judges, curtail their discretion in making the most critical determinations of when probation should be granted to offenders.

We urge affirmance. Thank you.

REBUTTAL OF JAMES C. BONNER, JR., ESQ.

ON BEHALF OF THE PETITIONER

MR. BONNER: I just have a couple more remarks. I wanted to go back to the record and the original representation that was made and point something out that I might not have emphasized enough. The Chief Justice quoted that excerpt from it, but I would like to point out that this colloquy with the defendant was simply can you pay a fine and so forth.

There was nothing in that colloquy indicating the judge wanted that fine in lump sum and not in installments.

QUESTION: Was there no discussion of the amount of the fine?

MR. BONNER: No, sir, there was apparently no discussion of the amount either. But basically, there is just no rationality.

QUESTION: Do you contend that the sentence was unconstitutional when it was imposed?

MR. BONNER: No, sir. It was unconstitutional when she remained incarcerated under it for her involuntary inability to pay.

I agreed that it looked perfectly good and if the judge had imposed a $5 fine or a $10 fine,there would have been no problem, but he did not do that. Here basically though there is no rationality in the sentence.

The State sentence says that it makes her appear to be

a better probation risk and that is just simply not true.

QUESTION: These arguments would come with much better shape if there had been some evidence of an effort to tender or promise to pay the fine over a period of time.

MR. BONNER: Well, essentially, that is what the gravamen of the habeas was about, Your Honor. There was a discussion of that installment adjustment of the sentence.

Again there was opportunity for that necessarily to come up at sentence. For all she at sentencing, the family could have come through with it, but basically, as I say, the preconditional requirement here has no rational basis to anything having to do with probation or not. The sentence itself reflects the irrationality of it because she could go out, for example, and get that money from a loan shark and that would not auger well for her chances on probation.

The local procuror could come in and give it to her, but again that would not indicate either family interest, family support and it would not indicate that she would be a good risk for probation. This is the problem when the fine is made to turn solely on this irrational fact which really does not have anything to do with the fine and delicate calculations that the judge ought to make when he assesses whether or not this defendant can serve her sentence successfully on probation.

I think that is all I have to say.

QUESTION: Your only claim is the equal protection claim, is it not?

MR. BONNER: Yes, sir. I think originally the due process claim was made in the habeas petition and there is no reason why it could not have been made throughout.

QUESTION: But you do not make it, do you?

MR. BONNER: Well, sir, we are dealing -- I do not think there is any need to. I think we are in an area where due process and equal protection blur. We are coming down to exactly the same kind of thing here. This is an arbitrary requirement that is excluding her from the benefit of probation.

The argument, I think, would fly equally as well on due process.

QUESTION: But I am asking what argument you are making? And as I understand your brief and now as I think I understand your answer, you are making an equal protection argument?

MR. BONNER: Yes, sir.

QUESTION: Alone?

MR. BONNER: Yes, sir.

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

(Whereupon, at 3:31 p.m., the above-entitled case was submitted.)