ORIGINAL

In the

Supreme Court of the United States

HAROLD RAMSEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-6540
	)	
NEW YORK,	)	
	)	
Respondent.	)	

Washington, D. C.
February 22, 1979

Pages 1 thru 51

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HAROLD RAMSEY,

Petitioner,

v. No. 77-6540

NEW YORK,

Respondent.

Washington, D. C.
Thursday, February 22, 1979

The above-entitled matter came on for argument at 10:25 o'clock, a.m.

BEFORE:

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

STEVEN W. FISHER, ESQ., 16 Court Street, Suite 1210, Brooklyn, New York 11241, on behalf of the Petitioner.

RICHARD ELLIOT MISCHEL, ESQ., Assistant District Attorney, Kings County, 400 Municipal Building, Brooklyn, New York 11201, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. JUSTICE BRENNAN: We will go out of order, if we may, until more of our colleagues arrive, and hear first the case 77-6540, Harold Ramsey versus New York.

Mr. Fisher, you may proceed when you are ready.

ORAL ARGUMENT OF STEVEN W. FISHER, ESQ.,

ON BEHALF OF PETITIONER

MR. FISHER: Mr. Justice Brennan, and may it please the Court:

The case involves the practice of plea bargaining and the voluntariness of a guilty plea. Its distinguishing feature is that it presents for review the issue of whether and to what extent a sitting trial justice may participate in the actual give and take of negotiations for a guilty plea, and it invites the resolution of a question specifically left open in Brady v. United States of what the consequences would be if a judge were to deliberately employ his sentencing power to induce a defendant to tender a guilty plea by threatening to impose a harsher sentence after trial.

Harold Ramsey, the Petitioner, was 24 years old when he took this plea. He had a history of emotional problems and was certainly no stranger to the criminal justice system in Kings County. He had been a juvenile delinquent. He had been adjudicated a youthful offender and had been convicted of a felony prior to this involvement with the law.

In this case, he was charged with two separate armed robberies. As his case made its way through the courts of Kings County, he appeared in a conference part which was specially designated in Kings County for the exploration of the possibility of disposition without trial. In that part, he answered a guilty plea to the reduced charge of unarmed robbery and did so upon a sentencing promise made by the judge of an indeterminant term of from three and a half to seven years incarceration, that being only slightly greater than the very minimum he could have received under New York law. Subsequently, he withdrew that plea and the case was transferred to a trial part where Mr. Ramsey for the first time encountered the judge whose conduct is called into question here.

It was eighteen months after he had been arrested and he had been incarcerated throughout that period of time, when Mr. Ramsey was afforded a pretrial Wade hearing. One witness was called. She identified the Petitioner as the perpetrator of the armed robbery, quite definitely. And the defense tried to raise some issue as to the propriety of pre-trial identification techniques. However, the next morning, prior to the conclusion of that hearing, the defendant, Mr. Ramsey, offered to plead guilty, this time to the charge of armed robbery, as charged in the indictment, one count to cover both indictments, this plea upon a sentencing promise offered by the judge of an indeterminant term of from six to twelve

years incarceration.

There is no transcript of the negotiations that led to this guilty plea, because,as is the custom in Kings County and in New York plea,negotiations are generally conducted at bench conferences and are not recorded. They are not on the record. But we learned about the negotiation and what happened to lead the Petitioner to plead guilty because immediately prior to sentence the Petitioner moved on papers supported by his own affidavit and the affidavit of defense counsel.

QUESTION: Mr. Fisher, before you continue, you told us just a moment ago that ordinarily in Kings County plea negotiations are conducted at bench conferences of which no record is made.

MR. FISHER: That's correct.

QUESTION: Does that imply that it is quite usual for judges to participate in the negotiations?

MR. FISHER: Yes, it does, Your Honor. In fact, at oral argument in the Appellate Division below, the District Attorney quite candidly conceded that this type of negotiation goes on all the time.

QUESTION: And your position, I gather, is that it is always improper for the judge to --

MR. FISHER: I would ask that the Court establish a procedural safeguard based upon my analysis of Jackson, the needless encouragement of guilty pleas.

I would think that the active participation of a trial judge in the give and take of negotiations for a guilty plea encourages a defendant to plead guilty, and it serves no state interest, therefore, it is needless encouragement.

QUESTION: To what extent would you suggest the judge has any role to play?

MR. FISHER: Well, I think that an agreement may be reached between a defense counsel and the prosecutor. And that agreement may be presented to the trial judge.

Now, my argument is limited essentially to judges who are scheduled to preside at trial in the event that no disposition is reached.

QUESTION: A judge who will sentence the man if he pleads guilty and is found -- pleads not guilty but is found guilty.

MR. FISHER: That's correct. I find no constitutional objection to the conference part concept that is established in Kings County, where a defendant who may invite judicial participation can do so knowing that the judge with whom he is negotiating will not preside at a trial should no disposition be reached.

It seems to me that the source of the encouragement to plead guilty is the defendant's knowledge that a rejection of a plea offer made by the court, by the judge, will mean a trial held before this same judge who may view him then as a guilty

man who has rejected a fair disposition of his case.

QUESTION: What if the prosecutor offers to recommend a certain sentence to the defendant if he pleads guilty, and the defendant says, "How do I know what the judge will do? Your recommendation isn't binding." And the prosecutor says, "Well, if you are agreeable, we can take it to the judge and we may get some feel for how he thinks about it."

Would you say that's unconstitutional?

MR. FISHER: I would not object to the presentation in the federal system of an agreement being presented to a judge who then may ratify or reject the offer. The judge must act independently in accordance with his own responsibility. Certainly, his responsibility is to ultimately impose sentence. So that an independent agreement reached by the prosecutor and defense counsel cannot bind the judge, and they may present it. I do not find the same coercive impact in that presentation to a judge at that time.

QUESTION: What's the difference?

MR.FISHER: Well, the first difference that comes to mind is although -- assume that that agreement were rejected by the judge. There would be no personal investment in the plea bargaining procedure by the judge. There would be no personal rejection as in the case where a judge, himself, makes a specific plea offer and the defendant rejects it. The judge presumably would make an offer that he would be fair to all

sides. And by a defendant rejecting an offer made by the court he would then face the possibility that the judge would resent that rejection and that his resentment might either intentionally or subconsciously work its way either into a sentencing function or into the discretionary rulings that he would make at trial.

QUESTION: Mr. Fisher, in the State of New York or in Brooklyn is this by statute, by rule or by what -- this bench conference?

MR. FISHER: Well, the conference part -- there is a special part to which cases are sent after arraignment -- that is established by court rule. No statute that I am aware of in New York --

QUESTION: But what statute, rule or what says that a judge shall participate?

MR. FISHER: There is no statute, rule or other --

QUESTION: It is a custom that has grown up?

MR. FISHER: It has, Your Honor.

QUESTION: And the judge is a party in this decision?

MR. FISHER: Yes, and it has been recognized by the Court of Appeals in our State that judges do participate in plea negotiations, although some cases have questioned it referring to the ABA standards which have only last week been amended.

QUESTION: Well, on which side is the judge on in

the negotiations?

MR. FISHER: Well, it seems to me that the judge becomes an advocate for a disposition, his own perhaps.

In this case, this is a good example of where the prosecutor is taken out of the plea negotiating procedure, because all the prosecutor did here was prior to the Wade hearing he said that he would consent to a reduction in charge, he would consent to a guilty plea to unarmed robbery, his consent being needed under statute.

After the Wade hearing, he withdrew that consent, but the District Attorney never took any position and indicated to the court that he would have no position on sentencing. So the whole question --

QUESTION: If one of the parties, the district attorney, has no position on sentencing, what is the good of plea bargaining? Who is doing the bargaining now?

MR. FISHER: In this particular case and under these circumstances, the bargaining was between the judge and the defendant.

QUESTION: Is that normally understood to be plea bargaining, or is that a trial?

MR. FISHER: It is called plea bargaining in Kings County, Your Honor. I must say, though, that there are many instances in which the prosecutor will make the sentence recommendation in Kings County and may even condition his

consent to a reduction in charge upon the imposition of a sentence which is agreed to.

So, to that extent, I don't mean to imply that in all cases in Kings County the prosecutor does not participate. I simply say that in this case the prosecutor in effect did not participate except to first give and then withdraw his consent to the reduction in the charge.

QUESTION: Mr. Fisher, the ABA standard which you cite in the footnote on page 16 of your brief, was in fact changed last week, wasn't it?

MR. FISHER: It was, Your Honor. The proposal that we cite that was advanced to the ABA was adopted. It permits, at the request of both sides, when the defendant and prosecutor are having difficulty reaching an agreement, they may request a plea conference, as it were, at which the judge may be the moderator. We find difficulties with the part of the adopted ABA standard which indicates that the judge may independently offer a disposition that would be acceptable to him.

QUESTION: When you say that the ABA standard permits, what you mean is that it recommends that the states and the federal government or anybody else who might have sentencing authority ought to permit the judge, don't you?

MR. FISHER: Yes, that is what I mean.

QUESTION: But you would not agree with that if the

judge is the one who if the bargaining fails is going to try the case.

MR. FISHER: That's correct.

QUESTION: Even as a moderator?

MR. FISHER: I don't think that his position as a moderator would be consistent with constitutional principles. Certainly I would have objections to his proposing a disposition that would be acceptable to him. I would add, however, that in the same ABA standards adopted last week it is quite emphatically said that a judge shall neither by word nor demeanor indicate to a defendant that he believes a plea ought to be entered. And it also says that all this negotiation at this conference shall be conducted on the record.

The problem here is that the plea bargaining was conducted off the record.

QUESTION: Mr. Fisher, one other point. At this conference in this case, did they discuss the facts?

MR. FISHER: Well, it seems established that prior to the Wade hearing -- and generally they do discuss the fact. The prosecutor will say, "We think we can prove this." And defense counsel may say, "Well, we don't think" --

QUESTION: So, the judge that is going to try the case gets a prerun of the case that he is going to later try.

MR. FISHER: He does, Your Honor.

And in this case --

QUESTION: He could get a full run?

MR. FISHER: He could, Your Honor.

QUESTION: And so the trial of the case would be a new trial?

MR. FISHER: It would be. In this case, it seems established and uncontested that prior to the Wade hearing this very trial judge at apparently an unrecorded bench conference, again extended to the defendant the plea offer involving an unarmed robbery, carrying a three and a half to seven-year sentence, and that the Petitioner rejected that offer, insisted he was innocent and requested that he be permitted to go to trial.

What happened then was that the witness testified at the Wade hearing and the crucial part of the record, the clearest account of what happened at that negotiation following the Wade hearing is given at page 28 of the record, where the court and defense counsel engage in an exchange where counsel speaks about what followed the witnesses' testimony.

He says, very briefly, "There was some talk about a plea of guilty and at that time the plea of guilty was discussed -- talked about as I came up to the bench and we discussed it. And Your Honor said that you would give 6 to 12 with the District Attorney's approval. I came back and said to my client '6 to 12' and he said 'no.' And it went back and forth and finally we arrived at a decision."

And the court interjects about the district attorney having withdrawn his consent at that time to a charge reduction. And the lawyer agrees and then goes on: "We arrived at a 6 to 12 year sentence. Prior to that time, the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get 12½ to 25. Your Honor told me to take that back to my client, which at that time I did, Judge. I gave him that warning."

And the judge now explains and says, "Subject, of course, to my reading the probation report, it is the practice in my court when there is an armed robbery to impose a maximum sentence, unless there are mitigating circumstances." To which the lawyer replies, "Well, I think, Your Honor, in light of everything, that that was the basis of why the defendant took the plea."

Our position is that this plea in this record was plainly coerced. We have no quarrel with the proposition stated as recently by this Court as December, in Corbett v. New Jersey, that a state may, indeed, offer to a defendant substantial benefit in return for a guilty plea.

And we learned in Bordenkircher that a prosecutor may threaten to bring charges, which are justified on the evidence, in order to induce a defendant to plead guilty, that on a theory that the prosecutor and the defense arguably possess equal bargaining power.

QUESTION: How about a judge who, at sentencing after a guilty plea, normally says or announces that "I think it is only proper to give consideration"-- to give leniency -- because the person has pled guilty and indicated that he is ready for rehabilitation or something like that?

MR. FISHER: I think that might enter a judge's sentencing decision, but this judge --

QUESTION: Yes, I understand, but -- So that a lawyer may properly advise his client, at least this judge usually gives leniency.

MR. FISHER: Yes, he may.

QUESTION: You don't challenge that practice?

MR. FISHER: No, I do not challenge that, but I think that where the Petitioner and Respondent part company in the context of this case is whether the proposition that a state may offer substantial benefits to induce or persuade a defendant to plead guilty, whether that proposition includes a trial judge.

We submit that it does not, that the Court must draw a line at the trial judge. In the context of a criminal case, you cannot count a judge as a representative of the state. His obligation is to stand between the state and the accused, to insure that the accused is afforded all protections and safeguards to which he is entitled under law. We do not think that that role is consistent with a judge doing what this judge

did here, that is saying, simultaneously, "I will now give you a sentence of 6 to 12, but if this guy is convicted, after trial he will get 12½ to 25."

QUESTION: Yet for purposes of state action under the Fourteenth Amendment, the judge's action is every bit the action of the state in the same sense as the prosecutor's, isn't it?

MR. FISHER: In certain aspects it is, Your Honor, but I do not believe that in the -- within the confines of the statement announced in Corbett that a state may offer -- I do not think that the word "state" in that statement was meant to include trial judges. I think it was meant to include prosecutors who represent the state as the prosecuting body, not as the adjudicating body. There are different roles. A defendant may not be faced, on the one hand, with a prosecutor trying to persuade him to give up his Fifth Amendment constitutional right not to plead guilty and Sixth Amendment right to go to trial, and then also face the judge who is supposed to stand between him and the prosecutor.

QUESTION: I take it then you wouldn't think that any bargain that's been worked out between the prosecutor and the defense counsel should be presented for any kind of approval to the judge who may try the case?

MR. FISHER: I have no objection to that procedure, because I do not see, again, the coercion --

QUESTION: What if the judge says, "No, I don't agree with it"? And then he tries the case.

MR. FISHER: That might enter -- I think it might be better practice to go to another judge, but I don't think it is constitutionally mandated, because in the event a plea agreement is reached, it is essential that the plea be presented -- that the agreement be presented to the court.

QUESTION: So, what if the trial judge turns it down and the defendant goes back and says "I'll agree to something else," and they take it back to the judge and he agrees to it?

MR. FISHER: I find nothing wrong with that, Your Honor.

QUESTION: He knows that the judge has simply said if you don't go for something better, I am going to try you.

MR. FISHER: The difference, I think, is when a judge offers a specific disposition he becomes an advocate for it and the risk a defendant faces is a rejection of a disposition apparently desired by the judge. When a prosecutor and defense counsel, on the other hand, agree independently to a plea bargain, they must -- they have no other alternative but to present it to the court, to the judge, because the judge -- a guilty plea may only be tendered to the judge. There is no alternative -- and to require, in those circumstances, that a state or federal system mandate that the case be transferred

from one judge to another. And those circumstances may prove, I think, too burdensome and would not constitute a needless encouragement under my analysis.

QUESTION: Mr. Fisher, you rely, as I understand it, on the Due Process Clause of the Fourteenth Amendment.

MR. FISHER: I do, Your Honor.

QUESTION: And you contend for a rule that would never permit the judge to participate in the bargaining itself to the extent at least that defense counsel said he did in this case, if that judge is going to be the trial judge.

MR. FISHER: Yes, Your Honor.

QUESTION: Is the basis of that submission the knowledge on the part of the judge that the defendant is guilty or is it rather the potential resentment and therefore vindictiveness of the trial judge?

MR. FISHER: I think -- Well, the defendant, if he expresses an interest in pleading guilty and does so to the judge and the judge is likely to conclude that a defendant who is interested in pleading guilty is most likely guilty in fact.

QUESTION: Of course, judges all the time deal with the rule that certain evidence should be excluded because of -- sometimes for reasons not having to do at all with the guilt or innocence of the person, very probative evidence of his guilt. But a judge is required under the law, the Fourth Amendment or the rules of involuntary confessions, or whatever, to exclude

that from the trial. And yet the judge knows all about it.

Wouldn't that give him the idea pretty clearly that the defendant is guilty?

MR. FISHER: It would and the encouragement to plead guilty would be precisely the same. The difference, however, is that -- I read Jackson as prohibiting the needless encouragement of guilty pleas. And while in a suppression case if a defendant seeks the suppression of inculpatory evidence, he must address his suppression motion to the judge who must then decide it, be it confession or Fourth Amendment question.

Therefore, the judicial participation in that circumstance, is hardly needless. It is essential, even though it may ultimately work some coercive or encouraging effect on the defendant to plead guilty.

QUESTION: How about the situation -- Maybe it is pretty hard for a Brooklyn lawyer to realize this, but there are many parts of the United States that are not like Kings County, that do not have many, many trial judges, that only have one trial judge. Many counties in the United States have only one trial judge. Then it would no longer be needless. It would be a need, wouldn't it?

MR. FISHER: Well, I think not. I think in that circumstance, I can see no state interest advanced by the participation of a trial judge --

QUESTION: But there is only one in the whole county.

MR. FISHER: Right. And in that county there would be no judicial participation in plea bargaining.

QUESTION: There could not be --

MR. FISHER: There could not be under my proposal.

QUESTION: The other way it might come out is to say that well, in that county, it is not needless.

MR. FISHER: Except that -- That argument might be made, but I think whoever --

QUESTION: But you don't make it?

MR. FISHER: That's right. And I think that it would be up to whoever proposed that argument to demonstrate what that need is.

QUESTION: You used the phrase "needless guilty pleas." I am not sure I know what you mean by that.

MR. FISHER: My reasoning is based on what I see to be the underlying principle in the Jackson case, which is that the Constitution --

QUESTION: What do you think it means? That's what I am trying to get at.

MR. FISHER: What do I think it means? I think that what Jackson holds is that some encouragement or encouragement to a defendant to plead guilty is not always violative of due process. But the test of Jackson is whether that encouragement is needless, that is whether it serves a legitimate goal and whether or not that goal can be achieved by some other

means. And I think in this case the participation of a trial judge in plea bargaining serves no state interest, and therefore is needless, and it encourages a defendant to plead guilty. Therefore, it is needless encouragement and is barred under the principle of Jackson.

QUESTION: What if a judge who is assigned to a district where he is not regularly sitting, so that his habits are not known, announces at the beginning of the term, when they call the criminal calendar, that all persons who are tried and found guilty will get the maximum sentence permitted by the statute? Do you think that has a tendency to encourage guilty pleas by people who make a judgment that they are likely to be found guilty?

MR. FISHER: Absolutely.

QUESTION: Do you think that is bad?

MR. FISHER: Yes, I do.

QUESTION: Do you think Jackson prohibits it?

MR. FISHER: I think the principles of Jackson prohibit it.

I think there is a case that we cited in our reply brief called, I think, it is United States v. McCoy, where the Circuit Court, D.C. Circuit, question is presented precisely with a judge who announces that his policy is to impose a maximum sentence upon anyone convicted after trial of armed robbery.

QUESTION: What if, instead of announcing it, a particular judge, by long habit, communicates to the entire bar practicing in that court that that's what in fact he does, but he doesn't articulate that as his standard?

MR. FISHER: That's a closer question.

QUESTION: Why?

MR. FISHER: Because there is a difference between a lawyer saying to his client, "This judge is reputed to have a policy of imposing the maximum," -- the difference between that and a judge announcing in open court to a defendant, leaving no room for doubt or hope, "Yes, I have that policy. You will get the maximum if you are convicted."

QUESTION: Don't you think there are any advantages to the category of defendants as a class, persons charged, that the candor of the judge gives them a much better working basis for making a decision?

MR. FISHER: Your Honor, I agree with what I think is the consensus of opinion in the commentaries in the cases, that whatever benefit may accrue to defendants as a class with this increase of information, as they say, is outweighed by the coercive effect of a judge's announcement or judge's participation in plea bargaining.

QUESTION: Mr. Fisher, close to 20 years, more than 15 years ago, the Court of Appeals for the Seventh Circuit reversed a conviction on the ground of a statement of a trial

judge in Chicago that it was his practice and policy and considered habit to always give greater sentences to somebody who had pleaded not guilty and had been found guilty than to those who pleaded guilty.

Are you familiar with that decision? I can't remember it.

MR. FISHER: I am not familiar.

QUESTION: What would you think of it?

MR. FISHER: I would have trouble with it. The whole concept of differential sentencing is troublesome. It is true, as Mr. Justice White suggests, a judge may take into account a defendant's willingness to admit his guilt, to take the first step on the road towards rehabilitation, but an announced policy of differential sentencing, I think, would run into the same problem that we find in this case, and I think --

QUESTION: Although in your case you have,at least according to the defense counsel, active participation in the bargaining by the judge himself, and a precise statement in your case that if found guilty after a non-guilty plea, he would get the maximum sentence.

MR. FISHER: Which is twice --

QUESTION: There is a problem in this case as to what the facts actually are. All we have is that statement of defense counsel.

MR. FISHER: There are differening interpretations

now offered to the Court by the Petitioner and Respondent.

It seems to me that the Respondent has suggested in a footnote of his brief, as I pointed out in my reply, that if the sequence of events occurred as I read the record to show, that I may very well be entitled to the relief I seek.

Therefore, it seems to me that tacitly, at least, he has conceded that an evidentiary hearing, to establish which of the interpretations occurred, is required.

QUESTION: The colloquy to which you called our attention on page 28 of the Appendix -- most of the support for your factual position comes from Mr. Bavanzino, who is trial counsel for the defense.

MR. FISHER: Yes.

QUESTION: There is some qualified confirmation of it by the judge, but he immediately qualifies it.

MR. FISHER: Well, subject to his reading of the probation report is not, I don't believe, very meaningful, since in New York every court is obliged by law, every judge is obliged by law prior to imposing sentence to at least order and consider a probation report.

QUESTION: But then he said, "It is the practice in my court when there is an armed robbery to give a maximum sentence, unless there are mitigating circumstances."

MR. FISHER: Well, he has obviously misrepresented his position, because this defendant has pleaded guilty to

armed robbery and received less than half the maximum sentence.

So, what he really meant was that anyone convicted in his court --

QUESTION: After a not guilty plea.

MR. FISHER: -- after a not guilty plea.

Thank you, very much.

QUESTION: Why didn't they have these statements or negotiations transcribed? You say they never do it?

MR. FISHER: It is my experience that that is not -- It is the custom --

QUESTION: Is there a reason for it? I mean in the middle of a criminal trial, when you have a bar conference, side bar conference, isn't that transcribed?

MR. FISHER: In the middle of a criminal trial, certainly, when issues of law are raised, but not --

QUESTION: Why couldn't you do it then?

MR. FISHER: You certainly could. I think that it must be -- any negotiations, I think, the better practice is to transcribe it. It is simply not the custom in Kings County to do so.

QUESTION: In some counties it is.

MR. FISHER: I understand that. And it is the recommendation of the ABA, with which I agree.

QUESTION: I take it a state can have an announced policy of leniency for guilty pleas?

MR. FISHER: That's the implication or the statement in Corbett, if I understand it.

QUESTION: Otherwise, guilty plea systems would always be unconstitutional. I suppose almost everywhere prosecutors plea bargain on charges.

MR. FISHER: Yes. And, of course, the range of -- You see, a statute --

QUESTION: And if you ask almost any prosecutor if he plea bargains, if he says yes then you say your policy is to extend leniency in exchange for guilty pleas, what would his answer be?

MR. FISHER: Yes.

QUESTION: Almost everywhere?

MR. FISHER: Yes.

QUESTION: So, may a state have an announced policy of leniency for guilty please, or not?

MR. FISHER: May a state have an announcement --

QUESTION: Yes, the state, the prosecutor.

MR. FISHER: Yes, he may.

QUESTION: May a judge say"" I have a policy of extending leniency at the time of sentencing for those who have pled guilty"?

MR. FISHER: I don't think he can. I don't think he can.

QUESTION: Must a judge always -- May he say, "I

agree. I approve this bargain you've struck," based on leniency?

MR. FISHER: Once a bargain is struck, yes, he may say he accepts it, and may give his reasons for accepting it, if he so desires.

QUESTION: So, any time, must you defend the position that at sentencing a judge may never have leniency for a guilty plea?

MR. FISHER: No, that is not my proposition. My proposition is that he may not, prior to the plea agreement --

QUESTION: That isn't what I asked you.

I say, here is a judge who, at sentencing says, "My policy is to give leniency for guilty pleas." That's all he's ever said, but he says it almost every time and lawyers constantly tell their clients, then, that this judge's policy -- announced policy -- is to give leniency for guilty pleas. Now, is that unconstitutional?

MR. FISHER: Let me reconsider. I think yes. The announcement of a policy causes me trouble. The announcement of -- whether it be a sentencing. It may be in the individual case.

QUESTION: So, if he says "in proper cases my policy is to"--

MR. FISHER: In proper cases would be more acceptable to my sense of due process.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Mischel.

ORAL ARGUMENT OF RICHARD ELLIOT MISCHEL, ESQ.,

ON BEHALF OF RESPONDENT

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

Before I respond to Petitioner's arguments with regard to the constitutional propriety of judicial participation in plea negotiations, I would like to clear up what I perceive to have been a misconception -- not a misrepresentation, but a misconception -- of what the conference part in Kings County is all about.

The conference part is not statutorily mandated. There is no provision for it anywhere in the New York Criminal Procedure Law. However, the court rules enacted by the various appellate divisions of the State of New York have established a separate and distinct conference part, whereby after a defendant has been indicted, his case will be sent to the conference part for discussion concerning a disposition before a plea.

Present at this discussion are defense counsel, the prosecutor, not necessarily the defendant -- he may waive his presence -- and the judge. At that time, the prosecutor presents the information he has with regard to the case, the defense attorney responds with regard to defenses or any other matter that he would like to bring before the judge, and at that time the judge, after evaluating the entire record by

reading the grand jury minutes, listening to both sides, advises the defense attorney of what he would consider to be a favorable or permissible disposition of this case.

As counsel has pointed out, most of these negotiations, in fact, all of these negotiations do not appear on the record. But this is not necessarily a detriment to the plea bargaining system in Kings County because if there is any question certainly defense counsel and the court may go on the record and spread out, as in this case, their understanding of what the plea agreement was all about.

I have suggested in my brief that due process would be satisfied if a trial judge participated, if during the negotiations everything is spread out on the record. But that does not necessarily preclude or require, for that matter, that the negotiations be taken down step by step.

I see nothing constitutionally wrong with a situation in which at the conclusion of the discussions the prosecutor, defense counsel and the judge spell out the agreement and the terms of the agreement as they understood them to be.

Certainly, under those circumstances, particularly where a defense counsel,maybe looking towards a claim of prejudicial conduct or coercion,would be expected to indicate what he believed to be the coercive aspects of this plea negotiation.

Secondly, I would like to point out that it was

raised during oral argument, during Petitioner's argument that a suppression hearing is markedly different, because the suppression motion must be addressed to a particular judge, therefore establishing the strict necessity which he perceives under United States v. Jackson.

But the easy answer to that is that in addition to all of the prejudicial information which is brought out at the suppression hearing, at which time the judge may suppress evidence which conclusively establishes the guilt of the defendant, you may also have a suppression part or the counterpart of a plea part that we have in Kings County. What he seems to be saying is then that you have to have the suppression motion directed to the particular judge because the motion must be made to the judge. But on the other hand, a court can just as easily set up a suppression part where the trial judge, or suppression judge, hears all suppression motions and then after the disposition is reached the case may be sent back to the trial judge.

With regard to the American Bar Association standards, I think it is interesting to note that not only do they recommend an increased participation of the trial judge, or for that matter any judge, in which the judge may suggest to the defendant, completely unsolicited, what he would consider to be a favorable disposition. But, if in addition to that, the

American Bar Association specifically rejected a proposal which would require the disqualification of the judge on motion of the defendant, as a predicate for that motion it must be established that the judge had been exposed to prejudicial information in the presentence report.

Even the American Bar Association which in 1968 recommended no judicial participation in the plea negotiations, has now said a judge may only be disqualified if exposed to an unfavorable presentence report.

QUESTION: If not so exposed, he may participate only as a moderator, not as one of the bargainers; isn't that correct?

MR. MISCHEL: That is correct, Your Honor, but once the agreement is brought to the attention of the judge, and the judge says, "No, I don't want to go along with this agreement, go back and bargain some more," the judge is aware of the fact that the defendant wants to plead.

QUESTION: There was no going back in this one. It was all done with the judge there.

MR. MISCHEL: I am sorry, Your Honor.

QUESTION: In this case, he wasn't going back and forth to the judge. The judge held the whole thing.

MR. MISCHEL: That is correct, Your Honor, but --

QUESTION: And he did the negotiating; didn't he?

MR. MISCHEL: Your Honor, in all candor, this was

not the typical type of plea bargaining --

QUESTION: Well, it's the one we've got.

MR. MISCHEL: But, Your Honor, this is not a situation where the judge has said to the defendant, "Well, will you take a 1 to 3?" The defendant says no. "Well, how about a zit to 2?"

He is not negotiating with the defendant.

QUESTION: Well, as I understand it, the prosecutor said practically nothing.

MR. MISCHEL: Your Honor, that is unclear from the record.

QUESTION: Well, it is clear in the record that the judge did. The judge participated in the merits of the case.

Is that right or wrong?

MR. MISCHEL: Your Honor, may I qualify that?

QUESTION: No, sir.

Did the judge participate in the merits of this prosecution, or this man's alleged crime?

MR. MISCHEL: Your Honor, this judge did not suggest the plea be taken. Your Honor, this judge did not say this prosecution of this case was strong and the defense was weak, and therefore recommend --

QUESTION: Did he ask what were the facts?

MR. MISCHEL: The facts were presented to him at a Wade hearing, Your Honor.

QUESTION: Did he ask what were the facts?

MR. MISCHEL: Your Honor, the facts were only presented to him because a motion had been made to suppress in court identification testimony.

QUESTION: I'm not talking about that. I'm talking about this hearing which the judge held.

MR. MISCHEL: No, Your Honor, there was no discussion of the facts in this case, because, as I understand what happened in this case, the case had been transferred to this trial judge --

QUESTION: Was he going to try it again?

MR. MISCHEL: This judge was going to try the case.

QUESTION: So, at this conference hearing, does he only have the cases he is going to try or does he have all of them?

MR. MISCHEL: He only has the cases he is going to try, but this --

QUESTION: How can there be a conference part?

MR. MISCHEL: I am sorry if I've misled the Court. What happens is that there is a conference part, either --

QUESTION: Does every judge have a conference part?

MR. MISCHEL: No. Only one judge has a conference part, Your Honor.

QUESTION: And he tries all of those cases?

MR. MISCHEL: No, he does not, Your Honor. Either

a disposition is reached in what we call "Criminal Term Part 1A -- If no disposition is reached, this judge, the conference judge, assigns out the cases to the respective trial parts, at which time all motions are made and if --

QUESTION: Where did I get the understanding that in this case this judge was going to try this case?

MR. MISCHEL: The judge who was involved in the ultimate plea negotiations was going to try the case, but it is a two-step process. There are two judges involved in this case. The first judge who is the conference judge had worked out a plea agreement with this defendant. And this judge was not going to preside at trial. Three months after this defendant pleaded guilty to the same consolidated indictment which is before this Court, he withdrew the plea, claiming that he had been railroaded and coerced. After that, the case was transferred out to another judge, at which time, when the case was called, defense counsel approached the bench and asked the judge if he would have any objection to resurrecting the original bargain.

QUESTION: Was it during the trial or this conference business?

MR. MISCHEL: The conferencing of the case had terminated. The case had been transferred for trial.

QUESTION: Where was it that the judge was sitting on the bench? Was that the trial of the case?

MR. MISCHEL: This was at a pretrial hearing, a motion to suppress --

QUESTION: Pretrial hearing held in open court?

MR. MISCHEL: Right.

QUESTION: In open court?

MR. MISCHEL: That is correct. In open court.

And what happened was that when the case was transferred --

QUESTION: And there was a court stenographer there?

MR. MISCHEL: Yes, there was.

QUESTION: That didn't take this down.

MR. MISCHEL: No, the court stenographer did not take it down.

QUESTION: This was at the Wade hearing?

MR. MISCHEL: The Wade hearing was transcribed, but my understanding of the record was that first the case was assigned out to Mr. Justice Held. At which point, defense counsel approached the bench and said, "Your Honor, will you agree to a resurrection of the original plea agreement, namely a plea to robbery in the second degree and a term of 3½ to 7?"

At that point, the judge said, "Fine, of course, subject to my looking at the probation report and if the District Attorney agrees."

The District Attorney agreed.

QUESTION: That was a conference judge?

MR. MISCHEL: The original agreement was before the conference judge. Now we are in a different trial part. He is asking to resurrect the old agreement. Then defense counsel went back to the defendant and the defendant said, "I don't want that agreement. I turned it down before, besides I am innocent and I want to go to trial." Then he made his motion to suppress identification testimony. Identification witness gets up on the witness stand, goes to the facts of the crime, identifies the defendant as the perpetrator of the crime, and unsolicited says, "I wouldn't forget that man's face for 20 years."

At the conclusion of that hearing, and that's all the testimony we have, we have to assume that the entire proceeding was transcribed.

Petitioner certainly doesn't allege that there were any other witnesses.

At that time or the next day, the District Attorney, because this witness now has gotten up on the witness stand, and has exposed herself to cross-examination and has exposed the prosecution's case, now -- in the vernacular -- ups the ante and says, "I will only accept for robbery one."

It is the practice of the District Attorney's office except in particularly notorious cases, it is the practice of the District Attorney's office in Kings County never to recommend a sentence. So that what went on here was not unusual,

certainly not unusual to the County of Kings.

The judge, knowing that the District Attorney would only accept a robbery one plea, which is required by state law -- it requires the concurrence of both the judge and the district attorney -- The judge says, "Based on what I have seen, it is certainly legitimate. I have seen a witness testify, heard what she had to say. Based on this, since it is my practice in these cases -- armed robbery cases -- I impose sentences, the maximum sentence, which in your case would be 12½ to 25 years, subject, of course to any mitigating factors in his probation report -- "

QUESTION: Guilty until you are proven innocent?

MR. MISCHEL: No, Your Honor. What I think the judge is saying is, he is not saying to the defendant, "I am going to penalize you because you are going to trial." What he is saying to the defendant is "Look, this is my practice. It is a matter of sentencing discretion. I find that armed robberies in Kings County are particularly dangerous. They pose a particular danger to the safety of the people. I have decided, in my discretion, that armed robbers should be penalized more severely than other criminals because of that danger."

In short, he is saying, "If you go to trial --"

QUESTION: He also says, "You might persuade me to the contrary."

MR. MISCHEL: Persuade him to the contrary in what

regard, Your Honor?

QUESTION: Well, you said he said unless there is some kind of circumstances.

MR. MISCHEL: In the probation report.

QUESTION: Yes, which means -- is he a nut or something?

MR. MISCHEL: Pardon?

QUESTION: He's crazy? Who is it that would say it's a nice armed robbery; It is not bad?

MR. MISCHEL: No, no, but what he is pointing out, Your Honor, is that if there are redeeming factors in this man's --

QUESTION: Like what?

MR. MISCHEL: For example, what is his participation in the crime? What was the extent of the crime? Was anybody hurt? Does the man have a prior record? Does the man show signs of desiring rehabilitation? Does he show any remorse for the commission of the crime at all?

QUESTION: Did the judge explain that?

MR. MISCHEL: The judge is not talking to the defendant at this time. The judge is talking to an attorney who understands this. If the attorney didn't convey this information, Your Honor, to the defendant, then the defendant's complaint is with his attorney and not with the judge.

QUESTION: The defendant wasn't there?

MR. MISCHEL: The defendant was off on the side at counsel table. This was a conference between the judge and defense counsel. All this information was conveyed, Your Honor, to the defendant through counsel.

QUESTION: Don't you think we need a hearing to find out what happened? You weren't there, were you?

MR. MISCHEL: Your Honor, I certainly was not.

QUESTION: Well, wouldn't you like to have a hearing to find out what happened?

MR. MISCHEL: Personally, I would; but I would suggest to the Court there are four circumstances, or possibly three circumstances under which a hearing, in my view, would be totally unnecessary. One circumstance, of course, would be if this Court were to find that any participation by any judge, whether he be the trial judge or not, violates due process.

Or, if you assume Petitioner's facts to be the correct facts, and you state that due process was not violated in that case; or if you assume my facts to be the correct facts and say that in any event due process was violation --

QUESTION: How can we assume facts?

I have difficulty assuming facts.

MR. MISCHEL: I am not asking you to make findings of facts.

QUESTION: You said assuming your facts or his facts. Do you know what you said?

MR. MISCHEL: I am taking from the language, Your Honor, of the case in which you dissented, United States ex rel. McGrath v. LaVallee, in which there was a discrepancy in what actually transpired between the prosecution, defense and the judge. And in your dissenting opinion, you pointed out that even if you assume the prosecution's case to be what it actually states it is, I would still find a due process violation.

QUESTION: Yes, but that was when the judge said, "Now, son, let me talk to you, son, like a father to a son." I thought it was a little over-reaching.

MR. MISCHEL: The point that I am making, Your Honor, is that I think that if Petitioner's facts are borne out in the record, that the judge said unequivocally, "Take this back to your client, if he doesn't like the 6 to 12. If he goes to trial and he is convicted, I am going to give him 12½ to 25."

Your Honor, I would have no hesitation in saying that that was a bald threat to impose a penalty.

QUESTION: And unconstitutional?

MR. MISCHEL: And would violate the Constitution.

QUESTION: Is it fair to say, Mr. Mischel -- and I think I know what your answer is going to be, since what you've just told us -- that it is not at all clear from this record or from what part of the record is in the Appendix, what happened in this case?

MR. MISCHEL: Regrettably, Your Honor, it is not

clear from the record. There are two interpretations which can be placed on what transpired. We think for the reasons set forth in our brief at page 33, Note 38, that our position is the more persuasive decision.

QUESTION: You think so, but you concede that it is not at all clear?

MR. MISCHEL: I concede that, Your Honor.

QUESTION: Isn't the burden of proof in any case that comes to this Court from the state court where you seek to upset a criminal conviction on the Petitioner, the person who seeks to upset the action of the state court?

MR. MISCHEL: Yes, Your Honor, that is my understanding. However, because of the seriousness of these particular allegations and that we, indeed, feel that if Petitioner's account is the correct account, due process would be violated, we nevertheless feel that a hearing may be mandated in this particular circumstance.

QUESTION: Under what authority of this Court?

MR. MISCHEL: Under no authority of this Court. It is my understanding that the Petitioner would have the burden of establishing what went on.

QUESTION: Doesn't Petitioner have the burden right now, in this Court, of establishing the correctness of his contention, in order to establish the principle that the proceeding was unconstitutional?

MR. MISCHEL: That is correct.

QUESTION: Mr. Mischel, you told us, I think, that the record does clearly show that there was some participation on the part of the trial judge in the plea bargaining. You told us that, didn't you? Some.

MR. MISCHEL: The participation -- I'd like to classify --

QUESTION: And you further told us, unless I misunderstood you or misheard you, that if the Petitioner's counsel is correct in his constitutional claim that the Due Process Clause of the Fourteenth Amendment prohibits any participation of the trial judge in plea bargaining, then you lose?

MR. MISCHEL: That is correct, and there would be no need for a hearing, because his participation -- He certainly was actively engaged, but I think there are distinctions that must be drawn. I think that a judge who says, "Look, you go to trial or if you take a plea of guilty now, I will offer you 6 to 12, but if you go to trial and you are convicted, I will afford you every consideration that I afford every other defendant who is convicted before my court, and I will sentence you according to the valid exercise of my sentencing prerogatives." I have a lot of difficulty understanding how the trial judge in that case then becomes an adversary or a prosecutor.

QUESTION: How does this case fit with Santa Bello? I am sure you know that.

MR. MISCHEL: Well, Your Honor, in Santa Bello, it was a promise by a prosecutor which the defendant then relied upon, and then the court refused to honor.

Excuse me, that the prosecutor then reneged on his promise, but I think there is a very clear distinction between the conduct of a prosecutor and how far we would permit a prosecutor to go, as opposed to a trial judge.

For example, in my own opinion, I don't think that a judge could threaten the kind of treatment that the prosecutor in Bordenkircher threatened. Because under those circumstances a defendant has no alternative but to believe that the trial judge, because of his conduct, is now the prosecutor. And now he has got to go into court and not only fight the evidence of the prosecutor, but he's got to fight a hostile trial judge.

QUESTION: You puzzle me by something you said. You said that assuming the unfavorable version of the facts, from your point of view, that you kind of acknowledge that as a due process violation.

MR. MISCHEL: Yes, I would, Your Honor.

QUESTION: Well, how does the case, as you assume it to be, differ from the one the Chief Justice posed a little while ago where the trial judge just announces his policy is always to impose the maximum? Is that equally bad?

MR. MISCHEL: I would submit, Your Honor, that I would have difficulty with an announced policy that anybody who is convicted in my court would only be sentenced to the maximum, because at that point you are taking out what sentencing requires, that is flexibility and --

QUESTION: Supposing the judge just says, "My practice in cases of this kind is to give 17 years."

MR. MISCHEL: I still think that the judge, under those circumstances, would be imposing a penalty, because it is not based on any fact --

QUESTION: Supposing he always does it, and then take it one step further, as the Chief Justice did earlier; he just does it, every draft case, the man gets three years or every tax evasion case, two years, and all the bar knows it. What's the difference between that and the judge saying, "This is a policy I think I'll follow," and anybody ought to know it. Of course, there are exceptions when there are strong mitigating circumstances.

How do you differentiate? And why isn't it better for the defendant to really know what the judge intends to do?

MR. MISCHEL: I think that is wrong that prior to trial, before a judge has had any information given to him about a particular case, with particular facts and circumstances --

QUESTION: Well, he says, "My practice is," and it

is always subject to exceptions, which I think he said here, didn't he?

MR. MISCHEL: Then I misunderstood. When he is saying that it is always subject to exceptions or subject to mitigating factors, at that point, he is willing to take into account the fact that this is an individual and this person should be sentenced according --

QUESTION: Didn't this judge do that?

MR. MISCHEL: That is correct. That is what our judge did. And I am saying that that was fine, but what Mr. Fisher is arguing is that it was a two-step process. He didn't say if convicted and subject to the mitigating factors. Under Mr. Fisher's view of the facts, the judge first offered a 6 to 12. Defense counsel went back, spoke to the defendant and the defendant said, "I want to go to trial. I am not pleading guilty and finish with it."

Trial counsel went back to the bench and said, "Your Honor, he doesn't want the plea." At which point, according to Petitioner, the trial judge said, "Well, if he doesn't like that, take this back to him: If he is convicted, I am going to give him 12½ to 25."

According to Petitioner, the statement about the practice, the statement about the probation report was merely an after thought or window dressing brought up at the time of the sentencing, which was six weeks after the plea. That's what

we perceive to be the distinction. Because under Mr. Fisher's facts, under Petitioner's facts, the judge is really disregarding his sentencing discretion and saying, "Look, I will give you -- based on what I know now, I will give you one sentence. If you go to trial, I will give you another sentence."

Under those circumstances, Your Honor, I believe that he is being penalized for asserting his rights, and that type of case would come under the mandate of Jackson. But where a judge says, "I will treat you like everybody else. You will be sentenced according to the valid exercise of my sentencing prerogative," a defendant is not being penalized for going to trial.

QUESTION: Is there no distinction in that Jackson involved a death penalty, did it not?

MR. MISCHEL: Yes, it did, Your Honor.

QUESTION: Do you think there might be one rule about a case as Jackson is, relating to the specter of a death sentence, and that it would not be necessary to apply that same concept to the matter of two or three years more or less?

MR. MISCHEL: Your Honor, in Brady v. United States; Mr. Justice Brennan pointed out, specifically, in his opinion in Parker v. North Carolina, that one of the big considerations in the Jackson case was the death penalty, and until Corbett

was handed down, I had assumed that that was probably the primary motivating factor. After reading Corbett, my understanding of the law is that where a statutory scheme is set up which automatically subjects an individual to a penalty -- that doesn't mean he has to get it -- but automatically subjects him to a penalty which would not be available if he pleaded guilty, that would come under Jackson and would violate due process. In other words, a statute would say "defendant on armed robbery cases gets 15 years. If he pleads guilty, he automatically gets 7 years." I would have difficulty with that situation.

QUESTION: What about Corbett, the situation in Corbett?

Mr. MISCHEL: In Corbett, Your Honor, the defendant, whether or not he pleaded non volt or went to trial, was subject to the same type of penalty. If he pleaded non volt, Your Honor, the trial --

QUESTION: But if he went to trial, there was no way he could -- and was found guilty -- there was no way he'd get a lesser sentence than the statute stated.

MR. MISCHEL: That is correct, Your Honor, but --

QUESTION: So, it was a flat rule, if you go to trial you have a certain penalty.

MR. MISCHEL: My understanding in Corbett, Your Honor -- and I may be mistaken -- was that if you went to trial

and the jury found him guilty of murder in the first degree, he got a definite sentence. If he pleaded non volt, he --

QUESTION: He could get less.

MR. MISCHEL: He could, but the point is that he could also be subject to the same penalty. The judge could penalize him for the same thing. And there was no discrimination or discrepancy between the two situations. In fact, in Jackson the opinion pointed out that if the jury could find him guilty and penalize him --

QUESTION: So what if the trial judge says, "Look, if you go to trial -- there isn't any statute -- if you go to trial you are going to get X -- armed robbery I always give 30 years; that's just the way it is. But if you plead guilty, I may give you less. I could give you 30 years, but I may give you less."

Now, you have just said that is unconstitutional. The only difference between what I just said and Corbett is that the 30 years is in the statute.

MR. MISCHEL: I'd have to retreat on that.

QUESTION: Which one are you going to retreat on?

MR. MISCHEL: I think that when a trial judge --

QUESTION: You don't need to answer right now, if you don't want to.

MR. MISCHEL: If I may articulate it, I think that a trial judge -- I'll take a step back. It certainly -- There

is no question that a trial judge is going to impose sentence. It is no secret, number two, that when a trial judge imposes a sentence that if a defendant pleads guilty he will definitely, or in most cases, receive a more lenient sentence. And the state is certainly encouraged, either through the trial judge, prosecutor or the legislature to encourage the taking of pleas by the offering of substantial benefits.

But I think that when a judge announces before trial, without considering the facts and circumstances of the case, without knowing anything about --

QUESTION: In Corbett, the legislature had announced before all trials that for certain crimes there is a mandatory penalty.

MR. MISCHEL: I understand that, but I think the difference between the legislature, Your Honor, and a trial judge was succinctly pointed out by Mr. Justice Brennan in Parker v. North Carolina, at Footnote 8, where he said that there is a distinction, a human distinction, between a statute which is rigidly implied and a judge who can be approached and any evidence of overbearing or overreaching will appear on the record. I think that when a judge goes on the record and says, "This is what I am going to do to you," under certain circumstances that can only be construed as a threat. A statute is a neutral, across-the-board type of application. A judge, on the other hand, may, through his rulings, as

Petitioner points out, through his personality, influence the conduct of the trial, which may not be -- I would hesitate to say this -- but may not be readily apparent in a record of trial.

QUESTION: What if the prosecutor says, "If you go to trial, my recommendation to the trial judge is always 30 years if he is found guilty"?

MR. MISCHEL: I am sorry, Your Honor.

QUESTION: What if the prosecutor says, "If you go to trial on armed robbery and are found guilty, I'll always recommend 30 years, without exception, but I am certainly willing to plea bargain, if you want to"?

MR. MISCHEL: Your Honor, that would seem to come under Bordenkircher, and I still maintain that there is a very definite distinction between the prosecutor's threat to recommend a sentence and a judge's threat to impose a sentence; because --

QUESTION: Because he's got the power to withhold it.

MR. MISCHEL: That is correct, Your Honor. And by threatening to impose the sentence, based on nothing more than defendant's assertion of his right to go to trial, I think that at that point the defendant can only assume that the trial judge has become, in fact, a prosecutor, and is no longer that detached neutral magistrate which we've all heard so much about.

QUESTION: Mr. Mischel, before you go on, you and your friend, too, have referred from time to time to the American Bar Association reports that cover this area, several of them. In light of the rather sweeping concessions you seem to have made, I wonder if you are aware that in every one of those reports the American Bar pointedly said they were not addressing constitutional questions, but merely good sound practice. None of those were suggesting a constitutional question in this problem. Are you aware of that?

MR. MISCHEL: Yes, I am, Your Honor, and I would only suggest that the American Bar Association, while they are not considering the constitutional ramifications of what they are doing, certainly would not suggest that the practices that they advocate would also run counter to the Constitution.

My problem with sentencing in this particular case is that when a judge, without regard to any factors, other than the fact that an individual --

QUESTION: I was approaching this from the -- I was making the observation from quite the other end of the spectrum, namely, that even when they recommended something was a desirable practice, they expressly disclaimed any notion that failure to follow that desirable practice would be a violation of the Constitution.

MR. MISCHEL: Your Honor, I understand that to be correct, and in addition the proposals of the American Bar

Association or the standards certainly would not be required in the states, and the state would be able to adopt a system contrary to that. I think that the system in Kings County fully comports with due process.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:29 o'clock, a.m., the case was submitted.)