ORIGINAL

In the

Supreme Court of the United States

OFFICIAL TRANSCRIPT OF PROCEEDINGS

UNITED STATES,)
)
PETITIONER,)
)
V.) No. 79-567
)
EUGENE DiFRANCESCO,)
)
RESPONDENT.)
)

Washington, D.C.
October 6, 1980

Pages 1 thru 43.

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner, v. EUGENE DiFRANCESCO, Respondent. : No. 79-567

Washington, D. C.,

Monday, October 6, 1980

The above entitled matter came on for oral argument at 2:17 o'clock a.m.

BEFORE:

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

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

EDGAR C. NeMOYER, ESQ., Boreanaz, NeMoyer & Baker, 736 Brisbane Building, Buffalo, New York 14203; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in United States against DiFrancesco.

I think you may proceed whenever you are ready, Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you, Mr. Chief Justice. May it please the Court:

One of the criticisms most frequently leveled against the operation of the federal criminal justice system concerns the manner in which sentences are meted out to persons convicted of crime.

These criticisms focus on the nearly unbridled discretion that is currently afforded a single individual, the district judge. As an almost inevitable result of this discretion, gross disparities may frequently occur in the sentences handed out to similarly situated offenders for comparable criminal conduct. These disparities adversely affect the public perception of the fairness of the administration of criminal justice and they also engender understandable bitterness on the part of those defendants who receive harsh sentences when they look at others similarly situated who have received much more lenient ones.

There is, in sum, a widespread feeling that something

should be done to deal with this problem of unequal sentencing. Now, one obvious means of accomplishing this goal is a system of appellate review of sentences. In fact, the adoption of such a system is one of the principal reforms proposed in the pending Criminal Code revision.

QUESTION: Where does that stand now, Mr. Frey?

MR. FREY: Well, I believe it's passed the Senate and I'm not sure that it's passed the House. I am told that it may or may not get passed during the lame duck session after the election.

QUESTION: So you are sure that it hasn't passed the House

MR. FREY: Well, I am sure that if it passes the House and the Senate that Conference will be required --

QUESTION: But it hasn't passed the House at this point?

MR. FREY: I believe it hasn't passed the House yet.

Now, under the Senate version of the bill, there would be a sentencing commission. And this commission would establish ranges of sentences for various offenses. And when the district court went to sentence it would have the unfettered discretion to sentence within those guidelines. But if it imposed a sentence above the guideline, the defendant would have a right to appeal and if it imposed a sentence below the guideline, the Government would have a right to appeal. And in

either case the judge would have to make a statement of reasons for departing from the guidelines, and those reasons would be subject to review for abuse of discretion.

QUESTION: Are you bringing this material up because you feel that an affirmance here would jeopardize the whole concept of appellate review of sentencing?

MR. FREY: Absolutely. Certainly an affirmance based on the decision of the Second Circuit would cast in serious doubt the validity of the proposed approach.

QUESTION: Incidentally, is this the first Government appeal under 3576?

MR. FREY: It is the first appeal of a sentence itself as distinct from the determination of the Court not to treat a particular defendant as a dangerous special offender.

QUESTION: And when was 3576 adopted? In what year?

MR. FREY: I think it was 1970.

QUESTION: Was it that far back?

MR. FREY: I believe so. Now, I think -- it is my view that the constitutional power of Congress to adopt this kind of reform is likely to depend on the disposition of this case. Now, it's true that an affirmance of the Court of Appeals would not prevent Congress from allowing defendants to appeal sentences that are considered excessive, but I think it's apparent that this will not solve the problems created by a perception of irrational sentencing discrepancies because those

are equally a product of undue leniency as of undue severity.

QUESTION: One problem that bothers me is, Mr. Frey, is all of the procedures that -- some of them perhaps have never been held to be constitutionally required; others at least implicitly have -- that attend the original sentencing, such as allocutions and probation reports and so on, none of those apparently is available in the appellate court.

MR. FREY: Well, I'm not sure the statute does not speak to that, but of course what we are talking about in the Court of Appeals under this statute is not a de novo sentencing proceeding but an appellate review.

QUESTION: No, but it's an increased sentence, and --

MR. FREY: Well, my view --

QUESTION: -- what everyone calls it, and I -- let's accept your statement that it's not a de novo sentencing proceeding but it could be an increase from ten years to 30 years and it's --

MR. FREY: Yes. In my view, Mr. Justice Stewart, I --

QUESTION: When one thinks that a sentence generally has been surrounded by all sorts of procedures in the trial courts such as presentence investigation, allocution, the demeanor of the defendant during the trial, and all those various things --

MR. FREY: Well, there are elements --

QUESTION: -- and Rule 11, which incorporates some of these things. None of these is available in the Court of Appeals, is it?

MR. FREY: I think it's generally true that a hearing on a suppression motion also has many protections which are not available when the Court of Appeals reviews it, but there is an allocation of function to the extent a sentence may properly be based on the demeanor, on the statements of the defendant, and allocution. I think those would, those considerations --

QUESTION: -- would be in the record.

MR. FREY: -- would essentially -- No, but to the extent it's based on things that the Court of Appeals doesn't have before it, I think those factors would be unreviewable. But if the Court of Appeals finds that there is a legal error -- let us say, for example that the District Court decides that hearsay is not to be considered and therefore it says, I would have sentenced you to 25 years had I considered this information about your organized crime connections, but I don't believe I can consider it, and therefore I will only sentence you to five, then that would be --

QUESTION: And that would be a legal error.

MR. FREY: -- a pure legal error. Or if a judge said, normally I would give you a very severe sentence, but because you're a woman I don't think women should be dealt with this severely.

QUESTION: And that would be a legal error. It might

be an unconstitutional legal error.

MR. FREY: It would be an abuse of discretion, a legal error, however, that I think could perfectly well be reviewed by an appellate court.

QUESTION: Or, normally, I would have given you a very light sentence, but since you pleaded "not guilty" and insisted on a trial I'll give you a lot heavier one.

MR. FREY: Well, then it wouldn't be a Government appeal. Now, it's not my job today to persuade this Court that prosecution appeals of sentences are a good policy, because that decision in the case of the dangerous special offender statute has been made by the Congress after careful study of the problem, and what this Court has to decide is whether the Double Jeopardy Clause bars Congress from implementing such a policy even though Congress has determined it to be in the public interest.

In the present case, respondent was convicted of violation of the Rico statute as a result of his role in an arson-for-hire ring. Because of his extensive criminal record and his major role in the ring, the Government invoked the provisions of the dangerous special offender statute, and after a hearing before the district court, findings were entered which included the following, and I read from page 43 of the appendix: "This criminal history of the respondent, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct

of the most violent and dangerous nature against the lives and property of the citizens of this community. It further shows the defendant's complete and utter disregard for the public safety. Defendant by virtue of his own criminal record has shown himself to be a hardened, habitual criminal from whom the public must be protected for as long a period as possible."

QUESTION: Mr. Frey, on this record in this appendix, is there anything else in there but what's in this appendix?

MR. FREY: In the record below? I imagine there is, but I can't tell you what it --

QUESTION: All I find in there is the indictment and the transcript.

MR. FREY: Well, there's nothing in here from the trial. This is the transcript of the dangerous special offender's sentencing hearing.

QUESTION: This transcript says that the transcript of the trial itself was introduced, and the indictment.

MR. FREY: I have not examined those things and I'm not sure that they would be material to the issue that's before the Court today.

QUESTION: Well, it would be material to me, sir. I want -- This is material. What is there at the hearing on the new charge that wasn't in the original?

MR. FREY: You mean at the sentencing hearing?

QUESTION: The sentencing hearing; yes, sir.

MR. FREY: Well, there is information relating to other offenses in which respondent was involved.

QUESTION: Would you point that out, please? I think you'll find it was in the original record. I mean, I don't see any witnesses at all.

MR. FREY: No, there are not witnesses.

QUESTION: That's right.

MR. FREY: And there was no -- but this was in essence stipulated to, and his status as a special offender was predicated as the statute permits.

QUESTION: Is there anything in the sentencing hearing that could not have been put into the original trial in the original sentence?

MR. FREY: Yes. Well, the original trial before a jury, it would be prejudicial to put in.

QUESTION: Well, the original sentencing was before the same judge.

MR. FREY: No, no; no, no. There was no previous sentencing of this defendant prior, on these charges prior to the dangerous special offender. He was tried before Judge Pratt in connection with --

QUESTION: How come he gave him ten years?

MR. FREY: He was tried before Judge Pratt in connection with the so-called Columbus Day Bombings in Rochester. He was convicted by Judge Pratt and he was given nine years for

the offenses related to that.

QUESTION: That's what I thought.

MR. FREY: He was tried before Judge Burke on the racketeering charges involving the arson-for-hire ring. He was convicted. Then this hearing was held before the Court under the dangerous special offender statute, which was a special sentencing --

QUESTION: That's what I thought; after that trial.

MR. FREY: After that trial.

QUESTION: At which time he could put all of this in. And at that trial he could have gotten 40 years, couldn't he?

MR. FREY: He could have gotten -- well, there is a question.

QUESTION: Well, isn't it -- you could have gotten 40?

MR. FREY: Well, that would depend on the answer to the question whether the Rico conspiracy and the Rico substantive offense are separate offenses where the enterprise that's alleged is an association in fact. I'm not certain that he could have gotten 40 years. But in any event --

QUESTION: What was the maximum he could have gotten? Thirty?

MR. FREY: Well, he could have gotten 20 years clearly on this count. And it is possible Judge --

QUESTION: If they had not been made concurrent?

MR. FREY: Excuse me?

QUESTION: Was it the concurrence of the sentences --

MR. FREY: If the sentences were concurrent -- well, both the Rico conspiracy and the Rico substantive offense carry 20-year penalties. If those are two separate offense under the Jeffers/Whalen line of cases, then he could have by making the sentences consecutive have gotten 40 years, and this was the --

QUESTION: At least he could have gotten 20; that's clear.

MR. FREY: At least he could have gotten 20. In fact, what he got was ten years concurrent with the sentences in the bombing charges, so in effect what he got as a result -- the

QUESTION: -- was one year --

MR. FREY: -- of the arson ring was one year in addition to sentences he already was required to serve.

QUESTION: Mr. Frey, under your understanding of the appeal procedure, if the trial judge makes an error of law that the Court of Appeals wants to reverse and does reverse, may the Court of Appeals remand for a second sentencing hearing?

MR. FREY: The statute authorizes it; yes.

QUESTION: Does that create any -- well --

MR. FREY: Well, I don't believe that would create a constitutional problem because I don't believe -- I think it is clear, for instance, that if you had a post-trial suppression hearing which -- and the evidence was suppressed as in Ceccolini and the Government appealed and the appellate court concluded that further hearings were required and a remand to clarify

certain points, I think the Court of Appeals could do that and a further hearing could be held. Now, it is true that in the present case we are not challenging any finding of fact, we are not asking for any further hearing. We are seeking purely an appellate-type proceeding and not a second trial if you are going to equate the sentencing with the trial. So this case is stronger for us, although I believe that a remand hearing would be permissible under the Double Jeopardy Clause. We'll try to get to these arguments.

QUESTION: But the statute permits the appellate court on the Government's appeal to impose a different sentence?

MR. FREY: It permits the appellate court on either the Government's or the defendant's appeal to impose a different sentence.

QUESTION: Or to remand?

MR. FREY: Or to remand for further proceedings.

QUESTION: And, just in a word, why do you think another sentencing proceeding doesn't infringe on the Double Jeopardy?

MR. FREY: Because I think what the Double Jeopardy Clause prevents the defendant from being required to do is to be tried again after he's been acquitted.

QUESTION: I guess then it's for the same reason that would permit the Government appeal in the first place?

MR. FREY: I think it's not --

QUESTION: -- the sentence is not final --

MR. FREY: The sentence is not final.

QUESTION: -- until the Court of Appeals --

MR. FREY: This is a kind of -- if jeopardy is involved at this point, if it hasn't terminated with the verdict of guilty, this is a kind of continuing jeopardy theory.

QUESTION: The sentence of the district court, then, is not final until the time to appeal has expired or until the Court of Appeals has reviewed it.

MR. FREY: That is correct.

QUESTION: Now that you've been interrupted, Mr. Frey, I notice that the bracketed material on the bottom of the second paragraph of what you read to us on page 43 of the appendix, you say that that phrase was printed in the findings but a line had been drawn through it by hand.

MR. FREY: I take it it's fair to conclude that there was some inconsistency in Judge Burke's findings and his sentencing. Indeed, that would be the part of what the Court of Appeals would have to consider in the event we --

QUESTION: In your submission the bracketed material ineluctably followed from what he said.

MR. FREY: That would be our position, and that his findings were amply supported by --

QUESTION: And since on the other hand he ultimately determined not to give a longer sentence, he or somebody under

his direction, presumably, scratched that out.

MR. FREY: But we would, under the statute, we would have a right to appeal if he's determined that respondent was not a dangerous special offender.

QUESTION: Yes.

MR. FREY: We would have a right to appeal the question, whether that determination was supported.

QUESTION: So it's -- here it's sort of ambiguous. He seemed to have determined it but he didn't with the obvious -- he scratched out the inevitable conclusion from that determination.

MR. FREY: I do believe that the consequences of all that would be a problem for the Court of Appeals if it has jurisdiction to entertain our appeal, and not a problem that should delay this Court in its consideration of the case.

QUESTION: And you're -- it's your point that the only question before us is, did the Court of Appeals have jurisdiction to entertain the appeal?

MR. FREY: To entertain the appeal; that's correct.

QUESTION: Nothing as to the merits of the appeal?

MR. FREY: Nothing as to the merits. We are not asking --

QUESTION: Is there any doubt whatever that on the record in this case the bracketed material is fully supported?

MR. FREY: I don't think it's any help in this Court.

I think it will be helpful to us in the Court of Appeals.

QUESTION: Is there any doubt that that is -- any doubt on the record?

MR. FREY: Well, I guess my colleague will probably -- may wish to argue the contrary, but our position is that it's amply supported by the record that shows an extended career of serious --

QUESTION: But your first position is, as I understand it, that that's not a matter for us to determine.

MR. FREY: It's not a matter for you to determine; absolutely.

QUESTION: We don't have to reach a --

MR. FREY: Now, before I begin with my main legal argument, I'd like to point out that there are three articles that have either just come out or about to come out that the Court may find helpful, dealing specifically with the DiFrancesco case. Two of them appear in the December, 1980, edition of the American Criminal Law Review. The first one, which is by Ron Stern, starts at Volume 18, page 51. That has just come out, and that one supports the Government's case.

QUESTION: By Ronald Stern, did you say?

MR. FREY: Ronald Stern, your former law clerk.

QUESTION: My former law clerk?

MR. FREY: The second one supports the Court of appeals. Mr. Stern's agrees with our position. And then there is a --

is a --

QUESTION: He works for the Department of Justice, doesn't he? He did.

MR. FREY: No, he did but he is in private practice now. There is also an article by Professor Weston in the June, 1980, Michigan Law Review, a preprint of which was sent both to myself and to opposing counsel and to the Court, and I understand it will be out in several weeks. It's a fairly lengthy treatment of this problem.

Now, we're dealing here with the constitutionality of an Act of Congress. And, of course, it's our position that the burden is on those who attack the statute to demonstrate how it offends the policies of the Double Jeopardy Clause. It seems to me that there are three possible objections.

The first is that the appeal itself constitutes an impermissible second jeopardy. The second is that the Double Jeopardy Clause vests the defendant with the right to have his sentence treated with the same kind of finality as an acquittal would be treated. And the third is the argument that an increase of the sentence on appeal constitutes a form of multiple punishment that's prohibited by Double Jeopardy concepts. Of course, we believe that none of these objections to Government sentence appeals is well-founded.

The first objection relates, I think, to the notion that the defendant should be spared the expense and anxiety and

uncertainty of a proceeding that may result in an increase of his sentence, a second proceeding after the original sentencing proceeding. Of course, as I have mentioned, in this case at least the second proceeding is not at all like that but it is on appeal argued by lawyers which the defendant does not even attend and which is limited to a review of the record made in the district court.

The second difficulty with this argument that the appeal itself is something which a defendant has protection from by the Double Jeopardy Clause is that it's well settled by the decisions of this Court such as Wilson and Scott that the Double Jeopardy Clause doesn't protect against appeals as such. In both Wilson and Scott the defendant had won a dismissal of the charges which would have made him a free man, and in each case the appeal threatened to jeopardize that and cause the reinstatement of a conviction or possibly even a second trial. The appeal entailed, it seems to me, precisely the same degree of ordeal and anxiety and expense as the appeal that would be entailed in this case, and yet the Double Jeopardy Clause was not offended.

What is offended by an appeal, if anything, is the relief that the Government requests. That is, let's say, a new trial following an acquittal. Of course, if the Government is requesting relief that it is not entitled to have, then there would be no case or controversy before the appellate court.

But it is the relief itself and not the appeal. The appeal is not a second jeopardy that the Constitution bars.

Now, before I talk about the finality question as to whether a sentence is like an acquittal, let me briefly turn to the question of multiple punishment. I have --

QUESTION: Mr. Frey, before you leave the first point on the anxiety interest and so forth on the appeal thing, it just ran through my mind, taking the language of the Double Jeopardy Clause, jeopardy of life or limb and so forth -- rather strong language, am I correct in assuming that if we accept your argument we would also -- because it's a constitutional provision applicable to the states, probably be holding that in order to achieve uniformity in the death area, it would be permissible in a state case, capital case from one of the states that has capital punishment, to permit the prosecution -- if the appropriate statute were enacted, of course -- to appeal the refusal of the trial court to impose the death sentence? Is that interest involved, would you say?

MR. FREY: As far as the Double Jeopardy Clause is concerned, leaving aside due process considerations of double jeopardy --

QUESTION: Right, just on double jeopardy.

MR. FREY: -- I think there may be special fairness problems that are involved with the death penalty. I think the kinds of problems that Justice Stewart adverted to earlier might

be a particular problem where you're dealing with the death penalty, but I think as far as the Double Jeopardy Clause is concerned, if you're talking about legal error, I think it would be our position that it would not bar the appeal.

QUESTION: The interest in avoiding disparity has been identified in those cases as well as here.

MR. FREY: Well, I think it would be -- yes, it has, certainly, and of course that was what was involved in the Stroud case.

QUESTION: Well, there are other provisions of the Constitution in addition to the Double Jeopardy Clause.

MR. FREY: Excuse me. Excuse me?

QUESTION: Your answer is confined to the effect of the Double Jeopardy Clause.

MR. FREY: Right. I'm not saying that the Constitution otherwise would permit --

QUESTION: The appeal might violate the Eighth Amendment or the Due Process Clause.

QUESTION: Or some other provision of the Constitution.

MR. FREY: I haven't thought about that.

Now, the proposition that allowing a Government appeal of a sentence which may increase a sentence constitutes multiple punishment is one that I have thought about in preparing my argument. And I have to admit that I simply don't understand it. The Government appeal in this case raises the question of

the proper single punishment for respondent's offense. The issue is not at all like the issue in cases like Whalen or Jeffers where the defendant received two sentences and the claim was that there was only one offense. It's not at all like the seminal case of Ex parte Lange where the defendant received two sentences when only one was permitted by the statute, and in addition the problem that was involved in the companion case in North Carolina against Pearce, he received one five-day sentence and one one-year sentence, although the statute only allowed one year.

Now, there is, of course, the dictum in the United States against Benz, and I am not sure how to explain that except to say that the dictum is clearly based on Ex parte Lange; it contains no independent explanation of the source of its conclusion. We have no difficulty with the conclusion that there is a multiple punishment problem in Ex parte Lange.

And, of course, neither Benz nor Ex parte Lange dealt with the question of Government appeals of sentences, but they both dealt with the question of the trial court calling the defendant back and changing the sentence.

Now, there might be a problem with the trial court having imposed the sentence and a few weeks later saying, I've changed my mind, I'm calling you back, but that is not the issue that we have.

And another peculiarity of the Benz issue is that it

apparently applies only if the defendant has begun serving his sentence. But if the defendant is on bail, apparently under this rule his sentence can be increased. Now, that doesn't make very much sense to me, and particularly in light of the requirement that he be given credit for time served. And of course, on the Government's appeal, any sentence that's imposed by the Court of Appeals would have to under Simpson against Rice give credit for the time served.

It doesn't make any sense to say that it turns on whether or not the defendant has begun serving his sentence. I think that matter was a judge-made nonconstitutional rule dealing with the power of the district court to call somebody back for resentencing. And of course Congress would have the power to overrule any such principle as long as it's not of constitutional dimensions.

Now then, we have the third and what to my mind is probably the only substantial argument that can be made in support of the decision of the Court of Appeals and that's the contention that the imposition of a sentence constitutes in effect an implied acquittal of any higher sentencing. Therefore the defendant's interest in the finality of that sentence would be comparable to his interest in an acquittal.

I think the best statement of this position is Justice Harlan's dissent in North Carolina against Pearce on this point, but I note that the Court did not accept that position and I

further note that the position would not necessarily apply to Government appeals. There was nothing wrong with the first sentence in North Carolina against Pearce and therefore an argument could have been made and was made by Justices Harlan and Douglas that there was no adequate justification for depriving the defendant of what he had acquired at the first trial, which was a ceiling on his sentence.

Now here we are talking about a case in which it's the Government's contention that there's something legally wrong with the sentence that was initially imposed and that the Government should be entitled to correct it. The Court of Appeals' contrary decision rests on a mistaken impression, as I've said before, about the relationship of the Double Jeopardy Clause to the defendant's finality interests. Those finality interests are not generally protected against the Government appeal but are protected only where the relief that the Government seeks is to set aside an acquittal and have a retrial.

This point can be made clear by comparing Pearce with Green. In Green there was an implied acquittal of a greater offense and the prosecution was barred from retrying the defendant for that offense. In Pearce there was arguably an implied acquittal of a greater sentence and the prosecution was not barred.

Similarly, in Bozza against the United States, the Court held that the correction of an illegal sentence to increase

it to minimum legal requirements was permissible under the Double Jeopardy Clause, but an illegal dismissal or acquittal entered by the judge in Fong Foo before the Government had barely begun the presentation of its evidence was held not reviewable. Now, what this suggests is that there is for Double Jeopardy purposes a recognized and substantial difference between the finality interest that a defendant has in an acquittal and the finality interest that a defendant has in his sentence, just as there are differences for Due Process purposes between the kinds of procedures that must be afforded to a defendant at trial and to a defendant in connection with sentencing.

I think I should reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. NeMoyer.

ORAL ARGUMENT OF EDGAR C. NeMOYER

ON BEHALF OF THE RESPONDENT

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

I represent the respondent, Eugene DiFrancesco, who is serving ten years in this matter in Atlanta. First I might in response to the remarks of Mr. Frey point out that the Federal Parole Board now has a severity index scale which they apply nationwide, which I submit is a much better way to even sentences out. Now --

QUESTION: But how is that relevant to our problem?

MR. NeMOYER: Well, his first point, as I understood

it, Mr. Chief Justice, was that there's a disparity in sentences. He said the public is complaining about it, it's one of --

QUESTION: Well, that's not. He was just mentioning that that's the genesis of congressional concern that led to the passage of the statute. That's nothing more than that.

MR. NeMOYER: I misunderstood him then, Mr. Chief Justice. In any respect, I think there is now a procedure to even out sentences without an appellate review which has a lot of problems in it.

QUESTION: But the Parole Board's power doesn't include any power to enlarge a sentence, does it?

MR. NeMOYER: No, that's true, Judge.

QUESTION: And is it a procedure or just some guidelines?

MR. NeMOYER: It's a regular scale, Justice White, and they take the offense plus other factors, recidivism, and come out with a scale --

QUESTION: What are you -- to what are you referring?

MR. NeMOYER: The United States Parole Board nationwide has a system by which they address sentences of all people in the federal parole system, Justice White. Justice White, I might mention --

QUESTION: But that isn't binding on the district judges or --

MR. NeMOYER: No. No, this is what happens to a

prisoner after he is incarcerated and it's a leveling nationwide. What they seek would only be a leveling circuitwide. Now, Mr. Frey has made reference to the Senate version --

QUESTION: But it also, however, might lead to some uniform application of this special offender statute.

MR. NeMOYER: That's true.

QUESTION: That's what they're talking about, isn't it?

MR. NeMOYER: No, I believe that they're talking --

QUESTION: Well, it's part of what they're talking about.

MR. NeMOYER: Part of -- yes, Judge. No question about it. But I think what they're complaining about, I think, Judge, in the final analysis is they're complaining, occasionally there's too lenient a sentence imposed by some judge and they want the right to appeal it.

QUESTION: A judge's ignoring the statute; that's what the claim is.

MR. NeMOYER: Ignoring the statute or they say -- for example, they think Judge Burke ignored Mr. DiFrancesco's background.

QUESTION: When you say "they," you refer to Congress, I take it?

MR. NeMOYER: No, I'm referring to the Department of Justice.

QUESTION: Well, wasn't it Congress that authorized these appeals?

MR. NeMOYER: That's true, that's true. And in that respect, in the first -- yes, you're right, Mr. Rehnquist.

QUESTION: But it's the Department that decides whether to appeal.

MR. NeMOYER: Right.

QUESTION: And their claim is that the judge is misapplying the statute.

MR. NeMOYER: It -- I don't want to -- you're probably right and it's just going by me. I think they're claiming that in the particular instance they think the defendant got too lenient a sentence.

QUESTION: Under the statute?

MR. NeMOYER: Under the statute. For example -- well, two things. One, earlier, Mr. Justice White, you asked about the present status in the House. As I understand it the House version is contrary to what the Department of Justice seeks; the Senate version does favor them, and maybe that's what Mr. Frey meant when he said there will be a conference.

QUESTION: Well, it isn't -- no assurance it's going to be passed in this Congress.

MR. NeMOYER: No; none at all. Now, he also read at length, sir, from the findings he said that Judge Burke made. What those are, Justice White, were their findings they submit

submitted to Judge Burke. He signed them, striking the last four lines out. So when he reads that he's reading, in effect, what they prepared below, which Judge Burke signed, striking out, I think, the most significant thing, namely, that the defendant should be incarcerated for a longer period than provided for by the underlying felony.

QUESTION: However, from page 36 of the appendix on up to 42 and -3, they recite that this fellow has committed everything except possibly rape and bank robberies. He's got murder, arson, arson-for-hire, bombing, mail fraud, extortion, and loan sharking. Now, those are all part of the judge's recitals, are they not?

MR. NeMOYER: No, they're not. They're theirs. They submitted those to Judge Burke and he signed them.

QUESTION: Well, you don't suggest that the judge just rubberstamped those statements about his past record?

MR. NeMOYER: Judge, the transcript of the hearing might be more illuminating, in which they went into all of that stuff, and I think Judge Marshall was alluding to it. Judge Burke said there's nothing new here that I have learned today except the defendant's birthday. And the part about the murder, Your Honor, which is the only one involving physical violence, Mr. Shanahan -- and it's the only thing he said at the hearing, was that that was dismissed; not only reversed, it was dismissed because it was based on perjured testimony.

The hearing below, Mr. Chief Justice, consisted strictly of Mr. Baldwin making statements. There was no testimony, as Justice Marshall pointed out. There were no witnesses and the defendant said very little -- or the defendant's lawyer, Mr. Shanahan, because I submit, Mr. Chief Justice, Judge Burke gave a very good indication of his feeling when he interrupted and said, about the only thing new that I have learned here today is the defendant's birthday.

QUESTION: How does that help you very much? I'm a little at a loss to understand how you think that helps, to erase all of this record. For example, by way of summary, he says, "A review of the defendant's criminal record shows four other convictions in state and federal courts for crimes committed since 1970 in the Rochester area. The same review reveals a history of virtually continuous criminal conduct over the past eight years, interrupted only by relatively brief periods of imprisonment in '75, '76, and '77." Now, are you suggesting the judge didn't know what he was signing when he signed that?

MR. NeMOYER: I'm suggesting to the Judge that -- one, the judge knew Mr. DiFrancesco very well, Mr. Chief Justice. He had him in front of him several years before, in which he sentenced him, and again it was to less than the maximum. He well knew -- for example, the Columbus Day Bombings, which really sound horrendous here, were nothing more -- well, I don't

want to make it that light but they were explosives placed outside of buildings that did very little damage, no one was hurt. In all the arsons that they allude to, Judge, no one was hurt. The only time that anyone was --

QUESTION: Arson isn't usually directed at hurting people, is it?

MR. NeMOYER: No, Judge. But I only mention that in passing.

QUESTION: The judge read the whole document closely enough to run a line through 2-1/2 lines, I think it is, or --

MR. NeMOYER: The last four lines, Judge.

QUESTION: Is it on 43, Mr. NeMoyer, and only 43, that there is the bracketed material is included, just at the very end there?

MR. NeMOYER: Yes, Judge. Yes, Justice Rehnquist. It was just at the very end. What I submit -- and it's hard to tell at this point, but I think all these were, I know that they were the submitted findings from the Department to Judge Burke. What I submit to this Court is that Judge Burke, who is in his 80s and does not have a clerk, looked at those findings, placated the Government by signing them, struck out the only part that really mattered -- namely, that "the defendant has to be incarcerated for a longer period than required by the underlying felony." In fact, Justice Rehnquist, I don't know, it might be like a medical report where you don't read it all, you read the

last paragraph, because that sets it out. And I submit that Judge Burke well could have found, as he indicated at the hearing, that he knows Mr. DiFrancesco, he knew the community, he heard the witnesses, he was well aware of the extent of the criminal activity, and that he struck out --

QUESTION: About eight lines later he did not strike out the statement or alter in any way that at the time of the commission of the most recent felonies and "is a dangerous special offender within the meaning of section 3575" and so forth. Anything ambiguous about that?

MR. NeMOYER: I think it might not, taken out of context, Mr. Chief Justice. And if he thoughtfully -- and we knew that he thoughtfully considered that, that is one thing. But I submit two things: one, he struck out the last part of the findings; and two, I think the clearest evidence of Judge Burke's disposition was this sentence that he imposed, which was clearly less than provided for the underlying felonies.

QUESTION: Well, none of this really has anything to do with the question presented in the petitioner's brief, does it?

MR. NeMOYER: Well; okay.

QUESTION: Well, just -- not "okay." Yes or no?

MR. NeMOYER: I'm sorry, Judge, I'm just trying to reflect that, Justice Stewart and -- forgive me. But I think, two, I think it does two ways. One, it does for Mr. DiFrancesco

because, first, Justice Stewart, we claim that we shouldn't be here. We claim that we were never properly adjudged a special dangerous offender as required by the statute.

QUESTION: And therefore, that the question is not presented by this case --

MR. NeMOYER: Right.

QUESTION: -- and therefore, I suppose it would follow that the petition for certiorari ought to be dismissed as improperly granted?

MR. NeMOYER: Right. That's our first position. And I might say, in the same vein, Justice Stewart, our second position was that the underlying felonies carry at least 20 years, 25 years under 3575, and 40 years under, I think, the general consensus, which was an ample sentence if Judge Burke chose to impose it, and he didn't. And if there was 40 years provided below, that this 3575 and 3576 had no office to perform, as Judge Haight pointed out in his concurrent opinion below.

QUESTION: Well, that would be the merits, wouldn't it?

MR. NeMOYER: Right.

QUESTION: And that really has nothing to do with the question at least as presented in the petitioner's brief.

MR. NeMOYER: It was our position, first, that we lost the --

QUESTION: That would be an argument that you should make to the Court of Appeals if we disagree with the Court of Appeals that this whole provision of 3575 violates the Double Jeopardy Clause.

MR. NeMOYER: Well, Justice Stewart, you're correct that if I am not prevailing on either of those arguments, then I have to go to the merits, and the merits are then, first of all, the double jeopardy argument. Now, it's our position, flatly, that the Fifth Amendment prohibits a person from being twice placed in jeopardy. It's our position that from the commencement of the trial up until the time of sentencing that the defendant is in jeopardy. In fact, Justice Stewart, it's my position, that jeopardy is most acute at the time of sentencing. That's when he faces the judge and he is going to be told what the outcome is, that it's the climax of jeopardy, if you would.

QUESTION: Do you think that after a bench trial and a finding of guilty and the judge who tried the case from the bench dies, it would be a violation of Double Jeopardy for another judge to come in and impose sentence?

MR. NeMOYER: No, I don't, Justice Rehnquist. But that's extraordinary circumstances, and I think, by and large, you're entitled to have your matter tried and finished by one tribunal, absent a circumstance of death or ill health; or something of that. But under that circumstance, no, sir, I would not.

QUESTION: Did you argue to the Court of Appeals that the statute didn't apply here?

MR. NeMOYER: Judge, I didn't argue to the Court of Appeals, and I'm not sure what my partner argued. I don't think so.

QUESTION: You've raised in your brief, you've posed the question in your brief, question one in your brief, you've got, "Whether respondent was properly determined to be 'dangerous' as defined and required by 18 U.S.C. 3575."

MR. NeMOYER: I don't know. I believe my partner did not argue that, Judge. I don't know. It was in the brief but I don't know that he argued it.

QUESTION: Well, did the Court of Appeals decide that there had been, he had been properly determined to be dangerous or he hadn't? They didn't even decide it, they --

MR. NeMOYER: They didn't.

QUESTION: They went to the constitutional question.

MR. NeMOYER: That's correct. They went directly to the constitutional issue and never passed on that.

QUESTION: But the dissenting opinion said that the statute was inapplicable.

MR. NeMOYER: Yes, Justice Stewart. The concurring opinion of Judge Haight.

QUESTION: Or concurring opinion; right. Separate opinion.

MR. NeMOYER: Right. Said that it had no office to perform because the defendant could have received 40 years below.

QUESTION: Which is really your question three in your brief.

MR. NeMOYER: Right; that's true. But, Justice White, I think the issue was never -- the court never addressed itself to that issue.

QUESTION: All right.

MR. NeMOYER: Now, Justice Stewart's point about the right of allocution and appeal to the 2nd Circuit, I think, is a real problem with this statute. The defendant under Federal Rule 32(a)(1) has a right to speak at sentence. It directs that the court address him personally and give him a right to speak. I don't see how under this statute you could -- you could get around that by -- I don't see the analogy to an argument, a legal argument on appeal. This is, I submit, a sentence is a mixed question of fact and law, that there's a question of credibility, a question of rehabilitation, many questions, and that a cold record to an appellate court is not as enlightening as the trial court sitting, seeing the defendant, hearing the witnesses, knowing the extent of the damage; and in sentencing he might have received dozens of letters. He'd know the nature of the person that sent him the letter, whether it should be given great consideration or no consideration.

consideration. None of these things, I submit, would be by and large available to the circuit court.

QUESTION: Of course, Mr. NeMoyer, one of the things that 3576 authorizes an appellate court to do on the Government's appeal is to remand for further sentencing proceedings and imposition of sentence by the trial court. And none of the arguments you are making would question the validity of that provision of the statute, would it?

MR. NeMOYER: No, Judge Stewart, no. I'm arguing against the circuit court itself --

QUESTION: -- itself extending the sentence.

MR. NeMOYER: -- modifying by increasing; true. Now, Congress -- as, Justice Rehnquist, you pointed out -- has made a decision in this area and they say, or they have spoken. But Congress, I submit, sir, changes every two years. Our Constitution has been in force for 189 years, and it should be more consistent.

QUESTION: Our double jeopardy rules change every two years too.

MR. NeMOYER: Well --

QUESTION: Almost every week around here.

MR. NeMOYER: In a hundred and -- this is the first time ever that --

QUESTION: Even though the same Justices are sitting.

MR. NeMOYER: Well, this is the first time ever that

the Department of Justice has sought to increase a sentence on appeal. It's never been done before. This Fifth Amendment's been in effect 189 years --

QUESTION: Did you say it was the first time they've tried it?

MR. NeMOYER: Yes, Judge. This is the first time --

QUESTION: Well, you ought to get your information updated.

MR. NeMOYER: Well, as far as --

QUESTION: It doesn't mean any -- doesn't mean anything in this case, does it?

MR. NeMOYER: No. Well, yes, it does. I think that the provision of -- I think it's a clear -- I think the Fifth Amendment is clear in this area, that they're not permitted to go and appeal sentence, to twice put the defendant in jeopardy. And I think it's dead clear, and I submit that's why it has never been attempted.

QUESTION: Well, if there's never been any case, then surely there's no controlling precedent, is there?

MR. NeMOYER: I think there is no controlling precedent right on point, Judge Stewart. I think that's correct. I think what's on point is the Fifth Amendment itself. But I don't -- as far as our position, and I think their position is, there is no case. Mr. Frey has cited many cases, Judge, but none of them stand for the proposition he is urging this Court

to sanction, namely, the right of the Government to seek increased sentence on appeal.

QUESTION: Well, you've just told us it's never arisen before.

MR. NeMOYER: That's true; that's true. And he cited a lot of cases, but none of them, Judge, stand for what he's asking here. Another problem I see with it is if you permit an appellate review of a district court judge's sentencing, you undercut the authority and stature of the district court judge. As it is now, when he sentences it has a degree of finality to it. But if every district court judge in imposing sentence then has his sentence subject to review by an appellate court, I think it somewhat demeans his authority and stature.

QUESTION: Well, do you suppose -- are you suggesting Congress wasn't aware of all these considerations?

MR. NeMOYER: Judge, they well might have been, and when Congress enacted this section they were well aware, Mr. Chief Justice, that it had constitutional problems, and that was discussed when it was enacted. And I'm saying that this Court I would like to consider these factors. Congress well might have considered them, but their viewpoint and this Court's viewpoint might not necessarily be the same, for some of the reasons we've stated. In addition, I submit that permitting in -- this section requires the Court of Appeals to put in writing, the Act of Congress requires the Court of Appeals to put in

writing the reason for their disposition of sentencing. I submit, Judge, I'm troubled with an Act of Congress directing the court to do, to make certain written findings, appellate court. But in any event, Judge, I submit that it would create an awesome burden to our appellate courts to, one, make them review sentences at the behest of the Government; make written findings; review lengthy presentence reports; maybe make some provision for the defendant to have the right of allocution; review maybe dozens of letters sent on his behalf and other sort of testaments. I think, logistically, it would be a tremendous burden to impose on our circuit courts.

QUESTION: How many appeals has the Government taken since this statute was passed? Do you know?

MR. NeMOYER: This is the first one that I'm aware of, Judge.

QUESTION: It doesn't suggest that there was a flood tide.

MR. NeMOYER: No, but, Judge, this -- Mr. Chief Justice, this is limited very narrowly to a special dangerous offender section. Their legislation, Mr. Frey indicated, that's pending now would give them this right across the board.

QUESTION: That's not before us now, is it? No question of that kind is here now. Congress hasn't even acted yet.

MR. NeMOYER: I think Mr. Justice Stevens was correct in that it would even apply in murder cases. And I think that's

what the final analysis is going to be here, Judge.

In forcing district court judges to articulate their reasons for sentencing, I think you would be limiting their discretion. And I submit that if their sentencing, the district court judges,would be reviewed by an appellate court, they would be required to find their findings, to put their findings in writing, or there would be no other practical way for a Court of Appeals to review it. And in so doing I think you would limit their discretion. They are now permitted to consider many factors, even factors outside of a presentence report. For example, the defendant's demeanor in a courtroom, maybe his demeanor on the stand, the type of witnesses he presents; many factors. By permitting the Government to appeal sentences you would force the district court judge to put in writing the reasons for his findings, which I submit would limit his discretion, which I don't think would be a good thing.

QUESTION: Is that the new bill, the pending bill -- require it?

MR. NeMOYER: No. Just -- I think that would be the outcome of permitting -

QUESTION: Do you know whether the pending bill requires that every sentence be accompanied by a statement of reasons?

MR. NeMOYER: No, I don't know that, Judge, Justice Brennan. I do know this though, Justice Brennan, that this

legislation, the second last sentence of 3576, requires the Court of Appeals to put in writing the reason for their disposition of sentence. My position, Justice Brennan, would be that the district court judge, if he knew his sentence was going to be reviewed by an appellate court, would have to put his reasons in writing because there'd be no other way that you could have a practical review. If it wasn't in writing the appellate court would not know the reasons.

Now, Mr. Chief Justice, you asked the question of the Government whether this was a final sentence. I think it is a final sentence. The statute does not talk about tentative sentences. The statute says, "shall sentence."

QUESTION: Well, there's one thing, if you're talking about finality in terms of appeal, and another if you're talking about final in the double jeopardy sense.

MR. NeMOYER: Well, I think in all senses this sentence was final. The statute says, "The court shall sentence the defendant to imprisonment for an appropriate term." Mr. DiFrancesco was sentenced and he is serving, pursuant to that sentence, at this time. Our position is, very strongly, sir, that it is a final sentence. Because the Department of Justice very much has said in their argument that if this was a tentative sentence, then it's not double jeopardy. And the 2nd Circuit said, that well may be but that's not the statute before us. The statute before us is what we consider, and in

this statute it's not a tentative sentence, it's a final sentence. And they well might come up with some other statute that this Court will have to consider, which may not be unconstitutional, but I submit, sir, this one is. Because it is a final sentence, subject to review and a sentence again.

Well, in closing, two things. The Government has pointed out an article that favors their position in the American Criminal Law Journal. There's an article immediately following it, United States-DiFrancesco, which they have not made reference to in their brief. It very much favors our position. It's Mr. George Freeman. I believe he's Justice Black's -- former Justice Black's clerk.

In summary, I think this would be a tremendous price to pay, namely, giving the Government the right to appeal sentences. It would subject all defendants to an apprehension regarding their sentences. They well might have pled guilty to avoid that apprehension, or they might not have the funds to go on appeal. It would subject all trial judges, their decisions regarding sentencing, to review. It would subject the circuit courts to making findings. And if somebody disagreed with those findings, there's only one place they could come, and I don't believe that this Court should be doing, reviewing the sentences. And I think that the only thing it really prevents is an occasional too lenient a sentence of a defendant and I submit that it's an extremely large price to pay for that

small mischief; that the Bill of Rights should protect the defendant.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Frey? You have only one minute left.

MR. FREY: All right.

ORAL ARGUMENT OF ANDREW L. FREY

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. FREY: I just wanted to answer Justice Brennan's inquiry. There would not be a requirement for findings under the proposed bill unless the sentence were below or above the guidelines. But if it was within the guidelines there — no findings would be required and it would be unreviewable.

We're talking here only about the existence of a legal error. If there's no legal error, there is no change in the sentence and therefore no Double Jeopardy problem. So only the correction of erroneous sentences is what's at stake and we believe the Double Jeopardy Clause does not preclude that for the reasons given.

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

(Whereupon, at 3:15 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-567

United States

v

Eugene DiFrancesco

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson

William J. Wilson