

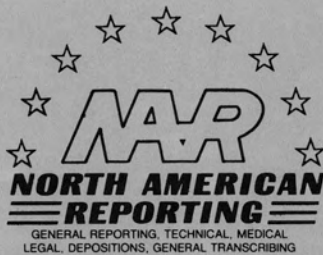
In the
Supreme Court of the United States

RAYMOND WOOD, et al.,)
)
) Petitioner,)
)
) v.) No. 79-6027
)
GEORGIA,)
)
) Respondent.)

Washington, D.C.
November 4, 1980

Pages 1 thru 48

ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:
3 RAYMOND WOOD, ET AL., :

4 Petitioner, :

5 v. :

No. 79-6027

6 GEORGIA, :

7 Respondent. :

8 -----:

9
10
11 Washington, D.C.

12 Tuesday, November 4, 1980

13 The above-entitled matter came on for oral argument
14 before the Supreme Court of the United States at 10:59 o'clock
15 a.m.

16 APPEARANCES:

17 GLENN ZELL, ESQ., Suite 620, 66 Luckie Street,
18 N.W., Atlanta, Georgia, 30303; on behalf of
the Petitioners;

19 JOHN W. DUNSMORE, JR., ESQ., Assistant Attorney
20 General, 132 State Judicial Bldg., 40 Capitol
Square, S.W., Atlanta, Georgia, 30334; on behalf
21 of the Respondent.
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C O N T E N T S

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JOHN W. DUNSMORE, JR., ESQ., on behalf of the Respondent	32

MILLERS FALLS
EZERASE
COTTON CONTENT

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We'll wait for the noise
3 to subside, counsel. We'll wait for a moment or two, here.
4 I think you may proceed whenever you are ready, now, Mr. Zell.

5 ORAL ARGUMENT OF GLENN ZELL, ESQ.,

6 ON BEHALF OF THE PETITIONERS

7 MR. ZELL: Mr. Chief Justice, and may it please
8 the Court:

9 This case involves an issue that was left open in
10 Tate v. Short, and that is, may a trial judge revoke the pro-
11 bation of the probationer or offender if he does not have the
12 funds to make the monthly payments.

13 The facts in this case are, I think, rather clear.
14 There are three probationers, of course; three Petitioners
15 in this Court. Raymond Wood, Edna Allen, and James Tante.
16 They were convicted several years ago of distributing obscene
17 materials. The records show that Mr. Wood was a clerk in a
18 bookstore -- no dispute about that -- Ms. Allen was a projec-
19 tionist in a theater, and Mr. Tante was the projectionist in
20 that theater. The fine imposed on Mr. Tante and Ms. Allen
21 was a \$5,000.00 fine and 12 months on probation -- that was
22 after the conviction. They were to pay that fine as directed,
23 which was \$500.00 per month, so they would have paid the fine
24 in approximately 10 months.

25 QUESTION: And that was a condition of the probation

1 was it not? [unclear]

2 MR. ZELL: That's correct.

3 Mr. Wood was convicted in two counts and he received
4 a \$5,000.00 fine in each count, to run consecutively, and 12
5 months on probation. Therefore, he had a 24-month sentence
6 and a \$10,000.00 fine, payable again at the rate of \$500.00
7 per month over a period of 20 months.

8 Thereafter I appealed the case to the Georgia Court
9 of Appeals, and I lost. I then certioraried the Georgia
10 Supreme Court and certiorari was denied. I then certioraried
11 this Court, and cert was denied with some justices dissenting.
12 The case came back to the trial court, through remittitur,
13 that is, and of course while the case was on appeal in Georgia,
14 as in most states in the federal system, the three Petitioners,
15 or offenders, defendants, were not on probation. The convic-
16 tion, I think, was in March of '77, the remittiturs came back
17 in October of 1978, and at that point, the three offenders,
18 the three defendants, started serving their probation, right
19 at the last week of October. And the record shows that the
20 probation officers told each one -- there was a different offi-
21 cer for each defendant -- I don't know whether there were
22 three different probation officers -- but anyway, each one
23 said you must pay your fine at the end of next month, at the
24 rate of \$500.00 per month.

25 In the record, at page 71, I notified the Court

1 immediately when they were put on probation that they did not
2 have the funds and the fines should be remitted ~~upon~~ or sus-
3 pended or some action taken, because there's going to be a
4 problem in this case on this \$20,000.00 in fines.

5 QUESTION: On your theory, then, the Court is power-
6 less to impose any punishments?

7 MR. ZELL: Oh no, the Court is certainly -- has
8 certain powers to enforce a -- payments on the installment
9 basis. Obviously you have your civil penalties certainly,
10 garnishment, levy on any property. For example, Mr. Tante
11 was a prison guard at this time, while he was on probation.
12 Mr. Wood had a job at a trucking company, I believe, he could
13 have been garnished. And Ms. Allen, unfortunately, was on
14 unemployment compensation and I don't think you can garnish
15 that, I'm not sure if you can.

16 QUESTION: Well doesn't Georgia have some exemptions
17 to its garnishment statute, for necessary expenses of living?

18 MR. ZELL: Yes, there's a certain percentage after
19 -- I think it's, it used to be 50 percent, and it's a little
20 lower, but there's a certain percentage you can only take out
21 for garnishment. And certainly some small sum of money could
22 have been affected by garnishment at this point.

23 QUESTION: Well so your complaint is not that a
24 fine was levied on someone who couldn't pay it?

25 MR. ZELL: Not at all.

1 QUESTION: But that the fine was too high?

2 MR. ZELL: Correct. Well that, and commensurate
3 with, first of all, the administration of justice -- what do
4 you do with people who violate the law, and the judge, trial
5 judge, makes a determination that these people can be released
6 on the streets, in society, in public. They are not a danger,
7 they shouldn't be incarcerated, they shouldn't be warehoused --
8 so to speak.

9 QUESTION: Mr. Zell, if you prevail here, what's
10 going to happen: mandatory imprisonment in every case, of
11 an indigent?

12 MR. ZELL: Well, I'd like to think, in our system
13 of justice, that trial judges will not take that position.
14 I'm sure some will. And I'd like to think that a trial judge--

15 QUESTION: I'm asking whether your argument might
16 turn out to be counter-productive?

17 MR. ZELL: It could, yes. I'm aware of -- some
18 trial judges have told me that if they can't lock up an
19 indigent defendant on probation, they're going to get straight
20 time sentences. I'm sure that's a possibility.

21 QUESTION: My other question is, have these prison
22 sentences been served?

23 MR. ZELL: In this case?

24 QUESTION: Yes.

25 MR. ZELL: Oh no, they've been -- the judge let them

1 stay out on bond pending this appeal, because they would have
2 served their sentence if they had been incarcerated.

3 QUESTION: So they -- their sentences have been
4 stayed?

5 MR. ZELL: That's correct.

6 QUESTION: And they have not been served?

7 MR. ZELL: That's correct.

8 QUESTION: What were the sentences?
9 Or, how much jail time will they spend?

10 MR. ZELL: Mr. Tante received -- and Ms. Allen,
11 received a 12-month sentence each. Under the computation, this
12 is a high and aggravated misdemeanor; they would serve,
13 they get four days --

14 QUESTION: Well, I -- but the sentence was -- they
15 were put on probation first, weren't they?

16 MR. ZELL: Yes. And they served almost three months
17 of that sentence.

18 QUESTION: And then --

19 MR. ZELL: They have nine left.

20 QUESTION: And was -- the probation was the same
21 length as their sentences?

22 MR. ZELL: That's correct.

23 QUESTION: I see.

24 MR. ZELL: That's correct.

25 QUESTION: So they go back and serve their --

1 MR. ZELL: Nine months less good time, which is
2 four days a month in this case; which would be 36 days less
3 nine months, and they'd serve about eight months. Mr. Wood
4 has 2 years, 24 months on probation; he has served, again,
5 three months, so he has 21 left to go, less four days a month,
6 for the remaining 21 months --

7 QUESTION: Does this record show from what resources
8 their bond was provided, if they were indigent and couldn't
9 pay the fine, the bond cost them some money, I suppose, in
10 Georgia?

11 MR. ZELL: Yes. The bond was provided for by their
12 previous employer. He put up the bond for them.

13 QUESTION: What does this record show about their
14 previous employer's practice in paying fines?

15 MR. ZELL: Well what happened was, and it's in the
16 record, of course, that they were first fined in this case,
17 and then thereafter they were charged again in another case,
18 so that each one was, and a small fine was imposed and paid by
19 their employer.

20 Paid by their employer, through me -- the fine was
21 paid, and they received something like very small suspended
22 sentences. The fines, I might add, it's on the record, were
23 much smaller than this case, they were \$750.00 fines, something
24 like that. And then when the remittitur came down in the first
25 appeal, they were -- the employer did not pay the fines in

1 this case, for certain reasons such as a different change of
2 attitude and a different employer --

3 QUESTION: Are these Petitioners here in forma
4 pauperis?

5 MR. ZELL: Yes, that's correct.

6 QUESTION: Well doesn't that suggest some validity
7 to Mr. Justice Blackmun's observation, that if the people are
8 before the Court, but not for the first time or the second
9 time, but for the fifth time, and the Court feels that, you
10 know, we don't want to warehouse these people and lock them
11 up with murderers, but if we can't do anything else to them --
12 if they are indigent, and small -- or the small time fines
13 haven't deterred them before, isn't there going to be a ten-
14 dency to at least send them to the -- some facility for
15 confinement?

16 MR. ZELL: Okay, let me just relay a little chron-
17 ology. The second cases were imposed after this sentence.
18 Now this was their first conviction. They stayed in the --
19 stayed working at the theater and bookstore, and they were
20 arrested and pled guilty and received a fine thereafter this
21 sentence though. And thereafter, they were before different
22 judges, and they received a much more modest fine, I think
23 something under -- less than a thousand dollars. And it was
24 paid by their employer because they were working there, they
25 were useful to the employer to keep working at the theater

1 and bookstore. Then when they went on probation they had to
2 quit.

3 QUESTION: Well is that really a very commendable
4 motive, that the employer pays their fine because they were
5 convicted of doing something that was illegal under Georgia
6 law?

7 MR. ZELL: Well certainly you can't enforce any
8 agreement between the employer and the employee, it would be
9 against public policy, like enforcing a gambling contract; he
10 promised to pay it, in some instances he did pay the fine. As
11 soon as they left work, he didn't pay the fines.

12 QUESTION: Is this a common provision in Georgia,
13 between employees of so-called adult bookstores and their
14 employers?

15 MR. ZELL: Yes and no. It -- many times the
16 employer has paid the fines for employees, many times -- many
17 times he has not. I just filed a cert in this court last
18 week involving a case called Simpson v. Georgia, in which he
19 received a \$20,000.00 fine in a different theater, different
20 business, and he's supposed to pay \$1,000.00 a month. And
21 he was a short order cook. And the judge again revoked his
22 probation because he did not pay the \$1,000.00 a month.

23 QUESTION: Mr. Zell, do you have pre-sentence reports
24 in Georgia?

25 MR. ZELL: That's correct.

1 QUESTION: Well don't they show how much a man is
2 worth?

3 MR. ZELL: That's correct.

4 QUESTION: So the judge knew that he had enough
5 money to pay that fine, didn't he?

6 MR. ZELL: Well what happened --

7 QUESTION: Can I assume that?

8 MR. ZELL: The judge knew -- well here's what
9 happened, Your Honor -- being, as a practical matter, when
10 they were convicted in the first instance, the judge, Judge
11 Alexander, was aware of what they were doing; they were making
12 nominal amounts of money as a clerk/projectionist. I'm sure
13 the judge thought, it's rather obvious from the record, that
14 he thought if he imposed this large fine their employer would
15 pay it. I'm sure that was the thrust of why the fine was so
16 heavy, was so large, your employer will pay it, based on maybe
17 other -- other cases, or at prodding of the prosecutors,
18 saying fine and dandy, don't worry, it will be taken care of.

19 QUESTION: But the employer was just treating this
20 as a cost of doing business, sort of a --

21 MR. ZELL: That's correct.

22 QUESTION: -- licensing fee?

23 MR. ZELL: That's correct, sort of licensing, that's
24 correct.

25 QUESTION: But he is here in forma pauperis, now?

1 MR. ZELL: No. These people are the mere employees--

2 QUESTION: Oh, the employees.

3 QUESTION: What would happen if --

4 QUESTION: But they're not working there anymore?

5 MR. ZELL: That's right.

6 QUESTION: What would happen if the pre-sentence
7 report shows that Mr. Jones has a friend by the name of Mr.
8 Smith and Mr. Smith will give him a thousand dollars, and they
9 fined him a thousand dollars, and they're not working together
10 or anything, this is just a friend; would the Court be entitled
11 to go back on that?

12 MR. ZELL: Well, --

13 QUESTION: On the fact that he used some bad infor-
14 mation?

15 MR. ZELL: Certainly, he should, the Court --
16 again --

17 QUESTION: Well when you get through, I want to know
18 the difference between that case and this case.

19 MR. ZELL: Well certainly he should -- the judge
20 should modify the condition of probation and the fine -- if
21 there was some misinformation. Obviously, or even a promise
22 by the defendant -- how many defendants can afford --

23 QUESTION: Would you at that time tell the judge
24 that the man couldn't pay the fine?

25 MR. ZELL: No, there was no representation made. The

1 trial was --

2 QUESTION: You'd just let the judge go down that
3 road?

4 MR. ZELL: That's correct. What happened is, --

5 QUESTION: Now you want to complain about the judge?

6 MR. ZELL: Well, I mean that's --

7 QUESTION: You're not complaining about yourself
8 at all, are you?

9 MR. ZELL: Well, what happened is, the trial was
10 over. The jury returned a verdict of guilty. At that point,
11 the prosecutor -- and it's not in the record, but I can --
12 prodded the judge to impose a large fine. That normally is
13 done in these cases, large fines. The judge was aware of
14 their employment and I think the judge, as in many of these
15 cases, felt that a third party would pay the fine.

16 There was no -- we do not tell the judge the third
17 party would pay the fine; we just -- the judge was aware of
18 the facts. I did not know if the third party would pay the
19 fine at that point, there was no guarantee, so to speak, at
20 that point. The case was then appealed. We did not -- they
21 asked for a large fine, it was just a prodding of the prosecu-
22 tor, and --

23 QUESTION: But you didn't represent the third party,
24 you represented this man?

25 MR. ZELL: At --during the trial in the first

1 instance, that's correct.

2 QUESTION: You still do?

3 MR. ZELL: Represent the third party?

4 QUESTION: No.

5 MR. ZELL: The defendants?

6 QUESTION: Yes.

7 MR. ZELL: Yes. Oh, before this Court, yes, I do.

8 QUESTION: You were not a court-appointed counsel?

9 MR. ZELL: That's correct, I was not.

10 QUESTION: So he's here as an indigent, in forma
11 pauperis, but he has paid counsel, then, I take it?

12 MR. ZELL: No. The defendants in this case, the
13 way it came about, was, I received a call -- I wrote the Court
14 a letter, felt obligated to let the Court know that the
15 defendants did not have the money after the appeal was ter-
16 minated, and they were no longer working for the owner of the
17 theater, and I notified the Court that they did not have the
18 funds and to please take some action, that they no longer
19 worked in there and there was going to be some problem, they
20 did not have the money and it would not be forthcoming.

21 The Court chose not to take any action, this is in
22 the record, page 71. And they continued to report on proba-
23 tion, and that's the last I heard of it.

24 I then received a call, the first week of January,
25 saying that they want you down in Court, that I represent

1 these three defendants and would I come down to court to
2 represent them. I contacted the three defendants and I asked
3 them, did they have money for counsel and did they want me to
4 represent them, I would be glad to. And they said yes, we
5 want you as our lawyer, you're familiar with our case. And
6 so I went down to court to represent them at that point.

7 QUESTION: You received a call from the Court.

8 MR. ZELL: Several -- from the defendants, from the
9 Court, from the solicitor -- concerning the hearing, I received
10 a notice of the hearing date, and of course, the defendants
11 called me and notified me that they were in some trouble and
12 what could I do for them.

13 QUESTION: But not from the third party?

14 MR. ZELL: No, that's correct; not from a third
15 party.

16 QUESTION: I still want to know, you represent them
17 officially here?

18 MR. ZELL: The defendants.

19 QUESTION: And not the third party?

20 MR. ZELL: That's correct. That's correct. I have
21 not been paid for this case and that's in the record. I think
22 the solicitor brought that out aptly during the
23 trial that I had represented the defendants, but I was paid
24 by the theater owner at the time of the trial, when they were
25 working for the theater owner. But as soon as they were put

1 on probation their employment was terminated and therefore
2 the ties were severed with the third party, or the employer.

3 QUESTION: It's clear, isn't it, Mr. Zell, that
4 the monthly installment repayments were conditions of the
5 probation?

6 MR. ZELL: Absolutely.

7 QUESTION: It was made clear that were these repay-
8 ments not made the probation would be revoked and the custod-
9 ial sentences would be imposed?

10 MR. ZELL: Okay. At that point, the fines were
11 imposed, that's correct. There was no --

12 QUESTION: It was made clear that it was a condition
13 of the probation?

14 MR. ZELL: Absolutely, yes. It was a condition of
15 probation.

16 QUESTION: Well, would it be -- and it's not con-
17 tended that the prison sentences imposed, which were probated
18 in this case temporarily, were excessive, under the law --
19 they were authorized by statute?

20 MR. ZELL: Within the statute, yes. They were --
21 that is, the maximum fine is \$5,000.00.

22 QUESTION: Would it be permissible for a judge to
23 impose an authorized prison sentence and probate it, depending
24 say, on the condition that the defendant, convicted defendant
25 stand on his head at twelve noon every day? And then if it

1 turned out that the defendant couldn't -- didn't know how to
2 stand on his head he would go to prison?

3 MR. ZELL: I think that's the reach in this case. It's
4 just an unreasonable condition.

5 QUESTION: Well what, and let's say the judge knew
6 at the time he imposed the probated sentence, that the defen-
7 dant, the convict didn't know how to stand on his head? If
8 he could have imposed the prison sentence from the word go,
9 couldn't he have imposed a -- an impossible condition?

10 MR. ZELL: It becomes -- that's correct, it was
11 an illusory sentence, gives them a taste of liberty to
12 see what they could raise, and if you can't raise the money,
13 in prison you go. It's really an illusory sentence. That's
14 what I point out in my brief.

15 QUESTION: Well, from the point of view of the
16 Defendants, isn't it better than a straight sentence from
17 the beginning?

18 MR. ZELL: No question about it. But what do you
19 do when the judge makes a determination and assume he did,
20 that these people should not be put in prison?

21 QUESTION: Well but wasn't part of his determination
22 the fact that they would be subject to some penalty, i.e.,
23 the payment of a fine?

24 MR. ZELL: Well --

25 QUESTION: He didn't intend to let them off

1 scot-free?

2 QUESTION: And it wasn't his decision, as indicated
3 here, that they shouldn't be imprisoned if they paid \$500.00
4 a month?

5 MR. ZELL: That's correct, that's correct. Hoping
6 that --

7 QUESTION: Otherwise that they should be, that's
8 the implicit condition.

9 MR. ZELL: No question about it, that's correct.
10 And all I'm saying before this Court is that when you have
11 the situation, is that other alternatives should be made avail-
12 able to the Court, and for the Defendants, such as community
13 service work, it would be much more constructive. How does
14 it serve the administration of justice, the prison system; for
15 example, in Georgia, --

16 QUESTION: Well we're not running the Georgia prison
17 system. I mean, that's up to Georgia, to provide it, if it can
18 -- if it falls within the United States Constitution.

19 MR. ZELL: Yes, but how does that help further the
20 objective in this case? Why do you want to incarcerate some-
21 body for not having the money? What -- then you have this
22 classification, suspect classification, poverty v. non-poverty--

23 QUESTION: Is that a suspect classification?

24 MR. ZELL: Well I --

25 QUESTION: As in San Antonio v. Rodriguez?

1 MR. ZELL: Well, I took the position in my brief,
2 and I take it now, that in social and economic policies, it
3 perhaps is not. But involving criminal justice, it should
4 be. Certainly, for the purpose of having the money and the man
5 go scot-free, such in this case, what if one of the proba-
6 tioners came up with the money? Mr. Wood, was able to raise
7 the money, went back into business and that's open to him,
8 perhaps, goes back in the adult book business, gets the money,
9 and pays his fine; he goes scot-free, so to speak.

10 QUESTION: Well you're suggesting that paying
11 \$5,000.00 is not somewhat painful.

12 MR. ZELL: Well it's painful if you don't have it.
13 I'm saying that if the person, they go and steal it --

14 QUESTION: You mean it isn't painful if you have
15 to go out and borrow it and put a mortgage on your house?

16 MR. ZELL: It certainly is, if you have the financial
17 resources to borrow the money.

18 QUESTION: If you have the house.

19 MR. ZELL: If you have the house. If you have --

20 QUESTION: Well you're not suggesting that indigents
21 should be free from any penalty for criminal conduct?

22 MR. ZELL: Not at all; of course not.

23 QUESTION: But the consequence comes out that way,
24 on your argument.

25 MR. ZELL: That's correct. If -- if you use money

1 as the criteria and the lack of money to go to jail. And I
2 think we have millions of people unemployed in this country,
3 at the present time. I think it doesn't serve any purpose,
4 any purpose, to lock up people who do not have the money.

5 QUESTION: Well if these people are in fact, indi-
6 gents as you suggest, putting them to work in community
7 service instead of incarcerating them isn't going to enable
8 them to support their families, is it?

9 MR. ZELL: Well, what you do is, and this is just
10 a suggestion, I mean not the only suggestion, is that if
11 you give them community service work, perhaps on weekends,
12 at nights -- there are many ways to serve the community,
13 and much more productive for the community for the system,
14 help the society in which they committed the wrong; it's cer-
15 tainly much more noble than to just lock somebody up behind
16 bars for 7 or 8 months because they don't have the money.

17 This case involves, and I'm sure the judge felt,
18 and I conceded, that a third party would pay the money. And
19 it has not been forthcoming. That's -- obviously the judge
20 had that basis.

21 This is similar in the Hunter v. Dean case, in
22 which this case granted cert. It was a -- if you remember,
23 it was like a 10-year sentence to be placed on probation if
24 you paid a \$2,000.00 fine in advance. The defendant could not
25 -- made a representation he could pay the money, he could

1 not pay it. And he was locked up.

2 And in Barnett v. Hopper, he granted cert in that
3 case as well and vacated it as moot. Same representation
4 was made, I can pay the money if you'll just give me
5 probation. And the judge did and he couldn't pay the money,
6 and the question is, do you lock people up where they don't
7 have the money? There should be other alternative means.
8 This involves traffic cases, misdemeanors or felonies.

9 QUESTION: But you don't question, Mr. Zell, as
10 I understand it, that the judge, so far as the Georgia
11 statutes went, could have imposed the prison sentence right
12 at the outset -- prison sentences, without any probation
13 whatsoever?

14 MR. ZELL: That's correct. He made a determination
15 they should be on probation at that point, that's correct.

16 QUESTION: Well if he made a determination they
17 should be on probation if they paid \$500.00 a month?

18 MR. ZELL: Oh no, no. Well, is this --

19 QUESTION: That's a condition of the probation to
20 be imposed?

21 MR. ZELL: Yes. They could go on probation, but
22 they should pay \$500.00 a month while they are on probation.

23 QUESTION: Right.

24 MR. ZELL: And if they don't pay that \$500.00 a
25 month, they are to go to jail.

1 QUESTION: Right.

2 QUESTION: Well they will also go to jail if they
3 don't live up to the other terms of their probation --

4 QUESTION: That's right.

5 QUESTION -- even if they pay the \$500.00.

6 MR. ZELL: That's correct, that's correct.

7 QUESTION: So it isn't just a condition that --

8 QUESTION: One of several conditions.

9 MR. ZELL: Right, that's -- which is in the appendix,
10 that's correct.

11 QUESTION: Right.

12 QUESTION: Mr. Zell, were there any proceedings
13 against the employer?

14 MR. ZELL: In this case, no. There was none.
15 They did not proceed against the employer. Why, I don't
16 remember why, I'm not sure why. It was merely against the two
17 employees. And clearly again, the trial judge relied on the
18 employer, frankly, I think, to pay the fines. And now he's
19 not going to do it, because of change of ownership, I might
20 add. He's gone now, and the money is not forthcoming. And I
21 don't see how, under Tate v. Short and Williams v. Illinois,
22 that you could -- this Court, could take the position to say
23 that a man who doesn't have the funds goes to jail when the man
24 or the defendant who has the funds, able to raise it through
25 employee, employer or a friend, does not go to jail. How do

1 you square this case with Tate case and the Williams case?

2 QUESTION: Yet, you concede that the judge could
3 have sentenced them ab initio, to twelve months?

4 MR. ZELL: In the very beginning.

5 QUESTION: Yes.

6 MR. ZELL: That's correct, that's correct. He felt
7 that they were good subjects, fit subjects, to be on probation.
8 That they should not be incarcerated -- he made that deter-
9 mination.

10 QUESTION: Well but isn't that a typical determina-
11 tion with a case of non-violent, first or second offenders?

12 MR. ZELL: Generally speaking, I would say so, yes.
13 The -- I might add that the American Bar Association of
14 Standards relating to sentencing suggests -- I mean, the
15 judge imposes a sentence, -- that he look at the profitability
16 in the crime, non-violent crime, but it also suggests, American
17 Bar Association, that they not revoke the man's probation if he
18 doesn't have the ability to pay the fine. And in all law review
19 articles I've read, and all the cases I could find, there's not
20 one case except in Georgia as far as I know in Shepherding
21 Tate and Williams, where a court has said if you don't have
22 the money on the installment basis, you go to jail.

23 QUESTION: Would you -- what if the judge had said
24 this, "well I'm sentencing you to a year in jail, but I'm
25 going to put you on probation subject to normal probation

1 conditions and I'm also going to fine you \$5,000, payable in
2 installments and if you fail to pay the installments, you go
3 to jail for ten days." That's a separate, I must have some
4 way of -- something to take the place of the fine, but
5 I'll just send you to jail for ten days if you don't pay the
6 fine. But of course you are subject to going to jail for a
7 year if you don't live up to the conditions of your probation.
8 Would you be here then?

9 MR. ZELL: I think so, yes. I don't think a man
10 should serve one day in jail based on his wealth. I think
11 that's -- should be a suspect category, if it isn't already
12 under Griffin v. Illinois case. And I think that that
13 should be a criteria. It serves no purpose to either raise
14 revenue, punish the defendant -- because he sits in jail
15 knowing that if he had the money, he'd be out, while other
16 defendants and other clients I've had, have paid the fine
17 and are not sitting in jail. I think it causes --

18 QUESTION: Are you saying that all criminal statutes
19 that says 30 days or \$100 are unconstitutional?

20 MR. ZELL: Under your decisions, yes. If you don't
21 have the money.

22 QUESTION: I don't know whether that's true or not;
23 I don't think we've held that, yet.

24 QUESTION: We've specially reserved it.

25 QUESTION: And -- but that's your -- then your

1 submission is that -- that \$100 or one day is bad?

2 MR. ZELL: No.

3 QUESTION: What?

4 MR. ZELL: Only if the individual does not have the
5 funds --

6 QUESTION: All right, but that's bad to apply to any
7 indigent?

8 MR. ZELL: Yes, or a person who has not squandered
9 the money away, has not been negligent, willful; that seems
10 to be the federal -- at least in the circuit, I'm from the Fifth
11 Circuit, and the Fourth Circuit, where they've reached that
12 issue.

13 QUESTION: What if he squandered the money, what
14 difference does that make?

15 MR. ZELL: Well, I think then the Court, such as in
16 a -- I'm using an analogy as in a divorce rule, in a man
17 supporting his family. If he squanders away money that he
18 didn't give to his family, he could be held in contempt of
19 Court. And I think this would be similar. If he squandered
20 the money away or had a good job that he turned down, to make
21 a lot of money, willfully didn't work, I think then the Court
22 can use that as a criteria to revoke him, put him in jail.
23 Because he's not trying under the probation, under his pro-
24 bation, to pay the fine.

25 QUESTION: And you think it's the function of this

1 Court to evaluate considerations of that kind?

2 MR. ZELL: No, it's the trial judge.

3 QUESTION: But the; we -- if
4 you say it's a consideration there, you're, by implication,
5 saying we must pass on that sometime.

6 MR. ZELL: Well certainly --

7 QUESTION: And you said this was a constitutional
8 issue.

9 MR. ZELL: Certainly. If a man is incarcerated,
10 no question about it; if he's incarcerated, and there's no
11 evidence to put him in jail, I think a writ of habeas corpus
12 would lie. If a man is put in jail for no reason,
13 whether it be he has no funds or for whatever reason, the
14 judge thought he ought to go to jail for no reason, he just
15 didn't like the way -- his hair was too long -- I had a case
16 like that recently, where the judge revoked a man's probation
17 because his hair was too long. And I think I luckily reversed
18 that in the state courts. But, a writ would lie -- you can't
19 lock a man up for no reason.

20 QUESTION: Well what if a man were convicted of
21 first degree murder and had no funds?

22 MR. ZELL: Yes.

23 QUESTION: Would you say he couldn't go to jail?

24 MR. ZELL: You mean if -- well, of course, in Georgia
25 if you are convicted of first degree murder, you must either

1 get a life or death sentence. I'm only talking about where
2 you're placed on probation or given a some kind of a sus-
3 pended sentence and you use wealth, money, as the criteria
4 to lock him up.

5 QUESTION: But it isn't part of the trial judge's
6 reasoning that you want to put as few people in jail as
7 possible.

8 MR. ZELL: That's correct.

9 QUESTION: And if he knew that you couldn't --

10 MR. ZELL: Collect the fine?

11 QUESTION: -- collect the fine or put him in jail,
12 he -- he probably would sentence him to jail in the first
13 place.

14 MR. ZELL: Well, I'm going to take it from a theor-
15 etical point of view, if I may. I'd like to think that trial
16 judges will make a determination -- and I think they are duty-
17 bound to do this -- whether a man should go to jail or not,
18 regardless of money, regardless of other criteria, where in the
19 first instance should he put him out on the street, serve his
20 sentence in society, first. If he makes that determination as
21 he did in this case, he then decides what other penalties
22 to impose upon the Defendant, such as a fine, community service,
23 weekends in jail, what other -- myriad amount of things he
24 could use to so to speak punish the man. Well, not punish him,
25 but make him helpful to the community. Primarily I'd consider

1 community service work would be the best thing to do with
2 people who don't have funds. That helps himself, he pays a
3 penalty, he loses his recreational time on weekends and at
4 nights, and he also helps the community by doing some charitable
5 work. What is the purpose of collecting this money? Are
6 we saying the government doesn't have the money to run
7 itself? Is this a revenue-producing measure? Or what are
8 we furthering by saying you pay this money, it's important
9 in the system of criminal justice. It isn't important; it's
10 very unimportant to collect money. And the judges, trial
11 judges should realize this and I think most of them do, frankly.
12 And to use money as a criteria to put a man in jail among
13 murderers perhaps -- and he sits in jail and he says golly,
14 my friend paid the fine and I can't. And he goes free because
15 he had money. I think this is a discredit to our system of
16 justice and it should not be allowed, and I think you should
17 follow the Tate and Williams case, this Court should, and did
18 not permit this.

19 QUESTION: Well what it comes down to is to find a
20 punishment that is available for imposition on him and I
21 suppose some people, due to circumstances, are free from any
22 punishment except going to jail.

23 MR. ZELL: Free from paying money. First of all, most
24 defendants violate the law because they don't have money,
25 obviously; poverty, I'm sure causes a lot of crime, I don't

1 think there's any question about it. And so most defendants
2 are broke and have no money. So the imposition of fines on
3 people who are broke or poor or have no money, who have robbed or
4 stolen to get money, it's just inconsistent. You're just
5 catching yourself going around in circles.

6 QUESTION: Would you object if the Court had a
7 hearing to find out if this man could pay \$10.00 a week?

8 MR. ZELL: Not at all. In fact, --

9 QUESTION: Well I thought so, but you weren't saying
10 it right then.

11 MR. ZELL: That's correct. Well --

12 QUESTION: All right.

13 MR. ZELL: In fact I asked the judge, I said look
14 judge, reduce the fine, let's make it commensurate. This is
15 a -- failure to pay as directed, \$500 a month. There's nothing
16 with the judge saying, well, I misread this, I thought you
17 could pay \$500 -- I'll reduce it to \$10.00 a month, which
18 may be as much to this individual defendant as \$1,000 a week
19 would be to some other defendants who are perhaps involved in
20 a Waco conviction -- organized crime conviction.

21 QUESTION: Your time is up. But just one question,
22 at least from me. Pursuing Justice Blackmun's question, could
23 the judge under Georgia law have said, I will consider proba-
24 tion if you will post a bond to guarantee the payment of your
25 fine over a period of time, as a guarantee for these

1 installments. Would that be permitted under Georgia law?

2 MR. ZELL: I don't think so. I think the sentence
3 clearly reads as sentence or fine or both and I don't think
4 it's permissible. But again, it's to bar -- based on his
5 wealth, to post the money, needed money.

6 QUESTION: Mr. Zell, let me ask you one more
7 question. So, supposing that an armed robber, convicted of
8 armed robbery, came before the judge for sentencing. Under
9 your going-around-in-circles-argument, would it be a consti-
10 tutional defense for him to say I just didn't have any money,
11 I couldn't get a job and so I just had to commit this armed
12 robbery?

13 MR. ZELL: I'm sure many defendants have said that to
14 the trial judge; I certainly wouldn't advise this Court that
15 I was represented to say that. All we're saying is that after
16 the judge makes a determination that he could be on the
17 street, that he could be on probation, and he has a suspended
18 sentence; don't lock him up later for not having wealth, not
19 having material goods.

20 QUESTION: Mr. Zell, I don't want to repeat myself,
21 but the determination that the sentencing judge made was
22 that he would continue him on probation so long as he paid
23 \$500.00 per month.

24 MR. ZELL: I think --

25 QUESTION: It wasn't an unconditional determination.

1 MR. ZELL: No, it was conditioned on paying the
2 money, that's correct.

3 QUESTION: Among other conditions?

4 MR. ZELL: That's correct. It was conditioned on
5 his wealth, on money, and he could not -- he reached the other
6 other conditions of probation, there were about ten of them
7 in the record. But the condition he couldn't reach was the
8 wealth, the money condition, and that shouldn't be a criteria
9 or reason to lock a man up.

10 QUESTION: And other people who could satisfy that
11 condition, but -- and who could satisfy all the conditions
12 stayed out of jail?

13 MR. ZELL: Who could pay the money, could stay out
14 of jail. And if the Court determines that -- that this man
15 paid the money and stayed out -- then that would be a reverse
16 discrimination, then the Courts say well maybe they could do some
17 community service work, put in a lot of hours, some of your
18 time is worth the minimum wage, \$3.00 an hour, and work on
19 weekends or at nights, working this fine off in the community.

20 QUESTION: Well as one of my colleagues noted,
21 it isn't our business to try to write Georgia's statute on
22 that subject.

23 MR. ZELL: But certainly it's available to the judge
24 under Georgia law. Thank you.

25 MR. CHIEF JUSTICE BURGER: Mr. Dunsmore.

1 ORAL ARGUMENT BY JOHN W. DUNSMORE, JR.,

2 ON BEHALF OF RESPONDENT

3 MR. DUNSMORE: Mr. Chief Justice, and may it please
4 the Court:

5 The issue in this case is whether a judge can condi-
6 tion probation on the payment of a fine, revoke that period of
7 probation for non-payment of the fine, particularly when the
8 individual has represented to the Court that they had the funds
9 or the means by which to pay the fine.

10 Underlying that consideration is whether the sen-
11 tencing judge could properly consider third-party sources as
12 assisting the individual in the payment of the fine.

13 Now this case does not involve, as some cases pre-
14 viously to the Court have provided, extending the period of
15 confinement greater than allowed by statute.

16 QUESTION: Mr. Attorney General, suppose a man has
17 got the money and he is sentenced to pay \$5,000 a month, which
18 is no problem to him. But he starts serving the sentence at
19 the end of the year in 1929 and he is caught along with
20 everybody else. In Georgia, what happens? Is there any
21 relief for him?

22 MR. DUNSMORE: Yes, he can always go through it
23 in Georgia, at any time, the Courts -- we pointed that out in
24 the footnotes, the Court always has the inherent power to
25 modify a sentence or to release the individual from the

1 conditions of his probation at that time. Normal procedure
2 as to what percentage of the cases, I could not indicate to
3 you, but that is a means available to a defendant.

4 QUESTION: You go to the sentencing judge?

5 MR. DUNSMORE: You go to the sentencing judge because
6 he retains jurisdiction over that case, during that time that
7 the individual is on a period of probation.

8 Now, I think it's important in this case that the
9 individuals, at this time, are not in confinement. And I was
10 under the misapprehension, and I'll correct that, on page 9
11 of my brief, and I indicated that confinement resulted -- it
12 did not, as Mr. Zell said, initially. I think the important
13 factor is that these individuals are out on bond, on an appeal
14 bond, that bond was posted on February 13, 1979, which was
15 the date when the judge said that after the hearing in January,
16 of '79, if you don't pay the arrears, I'm going to give you
17 two weeks to pay the arrearage for approximately \$1500, then
18 I'm going to revoke probation.

19 QUESTION: What was the amount of that bond?

20 MR. DUNSMORE: Now the bond for Mr. Wood is \$20,000,
21 and under the Georgia statutory scheme, the maximum amount
22 -- or, the amount that would have to be paid for that bond,
23 according to my figures, would be \$1,025. The statute is
24 Georgia Code 27-501. That sets out the fact that you can't
25 charge any more than 10 percent of the first five hundred

1 dollars, or any more than five percent on amounts over \$500.

2 As to the other two Petitioners, Ms. Allen and
3 Mr. Tante; it was a \$10,000 bond and I think my math worked
4 out to something like \$525.

5 QUESTION: Is there anything in the record to
6 indicate where this indigent got the money to pay that?

7 MR. DUNSMORE: No, and I think that gets into --

8 QUESTION: Well if it's not in the record, I don't want
9 you to pursue it. I just wanted to know if it was in the record.

10 MR. DUNSMORE: I think the interesting part of the
11 case, though, which the Court can consider, is in our Appendix
12 A, which is the revocation proceeding in January of 1979, Mr.
13 Zell told the sentencing judge, the trial judge, Judge Alexander
14 that these individuals' previous fines in connection with
15 other cases, had been paid and that he had paid them. Now, --
16 I think --

17 QUESTION: You said previous fines?

18 MR. DUNSMORE: That is correct.

19 QUESTION: Perhaps I misundertsood Mr. Zell, but
20 I thought that this was their first conviction.

21 MR. DUNSMORE: All right. If I can, the scenario
22 is, this is their first conviction. This is what happened:
23 each one of them was arrested and they pursued their consti-
24 tutional right to submit the matter before a jury; a jury in
25 March of 1977 found them guilty as charged and the judge at

1 that time said I'm going to put your sentence at 12 months,
2 the maximum for these convictions of distributing obscene
3 materials, since it's considered an aggravating -- a misdemeanor
4 of a high and aggravating nature, is 12 months and a \$5,000 fine
5 or both.

6 Now, after that time, they appealed to the Court of
7 Appeals, then to the Supreme Court of Georgia, then a writ of
8 certiorari. In the interim, between the time of the October
9 23, 1978 order when the judge says all right, I'm going to --
10 the terms and conditions of probation start on this date.

11 They entered pleas of guilty to subsequent offenses. It was
12 those subsequent offenses which are referred to in our
13 Appendix A on the brief in opposition to writ of certiorari,
14 where Mr. Zell tells the judge yes, I paid the fine, or
15 the employers gave me the money to pay these fines --

16 QUESTION: Well the could the judge have revoked
17 the then-pending probation because of that conviction of a
18 subsequent crime?

19 MR. DUNSMORE: Yes, he could have, I believe -- well,
20 I believe he could have. Well, I think the important part is,
21 of the case, is that he had -- and what we're talking about
22 here is sentencing discretion of a trial judge. What may he
23 consider? Can he consider other things?

24 Now, in the United States v. Grayson, this Court said
25 yes, the judge could consider the demeanor of the defendant

1 when he said you know, I find your defense to be highly
2 incredible and you know, basically, I think you're putting the
3 sham on the Court. By analogy, cannot the trial judge con-
4 sider representations to him by third parties that we will
5 pay the fines? Now, what does this do in the mind of the
6 trial judge? He says yes, we're going to put you, I'm going
7 to give you 12 months, and a \$5,000 fine. Or the 12 months
8 and \$5,000 authorized by law.

9 QUESTION: What does the record show, if anything,
10 about who paid the bond or the fee of \$1,000, or more?

11 MR. DUNSMORE: Now, the bond as to --

12 QUESTION: The bond for the -- continued liberty,
13 while this case is --

14 MR. DUNSMORE: Well I --

15 QUESTION: Isn't there something in --

16 MR. DUNSMORE: Mr. Chief Justice Burger, it was not
17 until the 27th of October that I found out that these indi-
18 viduals had a bond posted. Now perhaps I was negligent in
19 some regard in not checking this out sooner, but in part, I
20 relied in part on the solicitor's office to give me some of
21 the background material that I initially supplied the Court
22 with in our brief -- petition for certiorari --

23 QUESTION: Well wasn't there some statement by
24 counsel at one of these hearings that the employer had paid
25 the bonds --

1 MR. DUNSMORE: Oh Mr. Chief Justice Burger, yes,
2 that's in regard to -- well, two things. I believe the Peti-
3 tioners all said, and this is important, I think, they said
4 that when we were employed, our employers told us that if
5 at any time during our employment you're arrested or anything
6 we will pay your fines, we will make sure that bond is
7 arranged and we will provide you with legal representation.
8 Now in the appendix, there is indication that the King Bonding
9 Company paid the bonds for these individuals when they were
10 arrested -- and, I would assume, the continuing appeal bonds
11 until October 23rd, 1978.

12 QUESTION: Mr. Attorney General, if that's true,
13 why wasn't the owner arrested?

14 MR. DUNSMORE: Mr. Justice Marshall, I have no idea,
15 and I cannot speak for the solicitor of Fulton County.

16 QUESTION: I understand.

17 MR. DUNSMORE: Now these individuals also indicated
18 -- and I think the representation is, too, properly to the
19 Court, that here, the employer has -- the employer even told
20 one of them, I believe it was Mr. Tante, there was an indi-
21 cation in the probation revocation hearing, well how did you
22 know to get Mr. Zell? I believe there is testimony in there
23 that he had represented them previously. And I believe there's
24 also testimony in that revocation hearing that the -- it had
25 been suggested by the employer to contact Mr. Zell. And there's

1 also an indication in the record that Mister -- an inference,
2 anyway, because I don't think it comes out clearly -- an infer-
3 ence that the employer paid Mr. Zell's fee. Now, I think
4 we need to --

5 QUESTION: Mr. Dunsmore, let me ask you one question
6 about the appendix on page 21, and it's in the last paragraph
7 there where that court states, and this is the trial court,
8 order of probation, "It is further ordered that the Court, and
9 the Defendant is hereby advised that the Court may at any time
10 revoke or modify any conditions of this probation or change
11 the period of probation, and may discharge the Defendant from
12 probation." Was any application made in this case to discharge
13 the Defendant from probation?

14 MR. DUNSMORE: None on the record, now. And I say
15 that with -- well for the qualified remark, that on page 71,
16 of the probation revocation hearing, there is an indication
17 from Mr. Zell that I wrote the court. But I think as we
18 pointed out in our brief in this case, at the time the sen-
19 tences were imposed, the Defendants -- Petitioners in this
20 case -- sat back in silence. They never went in to the proba-
21 tion officers at that time and said, you know, we can't pay.
22 There's an indication that the probation officer said we'll
23 accept partial payments, and they never went in and told the
24 -- indicated to their probation supervisors that you know, we
25 could pay a lesser amount. They refused, and I use the word

1 refused, to pay the fine because they were under the impres-
2 sion, and I think rightly so, from -- on the conditions of
3 employment -- that their employers would pay the fine. And
4 therefore they took no action.

5 Now, I think what that amounts to in this case, re-
6 gardless of funds, is are we not deceiving a trial judge?
7 And as Mr. Justice Marshall says, let the judge go down the
8 road, -- you know, many times you say well can silence be
9 a condoning aspect? I think it can, in this situation. I
10 think we're talking about the integrity of the sentencing
11 function of the criminal justice system. To allow criminal
12 defendants to mislead a judge or, that is, to not bring to
13 his attention facts that are different, let the judge rely
14 on it, get the benefit of a lesser sentence, and then come
15 back in and say, gee I'm sorry, we just didn't have any
16 money. Particularly when you had one year and seven months
17 -- 19 months intervening from March of 1977 to October of
18 1978 when they were actually put under probation supervisors.
19 In that period of time they had an opportunity to check with
20 their employer, and say, are you going to pay the fine, the
21 record is silent, they did nothing.

22 They never, at any time, went and tried to pay
23 the fine. There's no showing that they went out to see if
24 they could borrow any money, to my understanding. All of
25 them were earning some sort of money and and the word indigent,

1 I think, has been used loosely in this case. One individual
2 making \$525 a month, another one \$400-\$500 a month, and the
3 one lady was on unemployment.

4 QUESTION: Did they ever ask the Court to reduce
5 the amount of the installments and put them over a longer
6 period of time?

7 MR. DUNSMORE: No, there was no effort made at any
8 time to reduce the installments or to seek anything else. As
9 a matter of fact, on page 69 of the Appendix -- Appendix A,
10 which is not the brown appendix, but the one appended to our
11 brief in opposition -- the judge, Judge Alexander, says I
12 didn't ask the question because I thought I could enforce the
13 agreement. Right there, there's evidence right there that the
14 judge was under the impression that the third parties would
15 pay this fine. Now why should the judge be able to look to
16 third parties? In the probation context, just as if we're
17 putting the individual out on parole, we're trying to find
18 an alternative to confinement.

19 Now an alternative to confinement has the purpose
20 of rehabilitation. We want to deminimize the amount of super-
21 vision that the Court has to engage in. Now if the Court can
22 look to a citizen, an employer or somebody in the community,
23 that aids the Court in its carrying out of its rehabilitative
24 function. Particularly, you know, in the context when we put
25 a man on parole; one of the things parole boards generally ask

1 -- where are you going in the community, who will vouch for
2 you, do you have a job, is there somebody in the community
3 grassroots that we can look to to assist us in rehabilitating
4 you? Now that same factor must be viewed in the eyes of the
5 sentencing judge.

6 Now, Mr. Zell and Petitioners say well gee, that was
7 an illegal agreement. That is, illegal to the extent that
8 you pre-suppose that the individual was hired with the purpose
9 of violating the law. But I think the judge rationally could
10 look to the employers because if they put a stake up in the
11 community for an employer, there's going to be continued
12 employment. Now one of the terms of the probation was that
13 they continue on employment. If that individual is working he
14 can contribute to his family. He doesn't become a burden to
15 society. The collection of fine in this case is not like Tate
16 v. Short, where they said it's a revenue measure. The judge
17 in this case is looking to third parties because they are
18 going to help in the rehabilitative aspect of that individual.
19 And also --

20 QUESTION: Isn't the judge a part of the whole thing?

21 MR. DUNSMORE: A party?

22 QUESTION: How can a judge take the word of a man
23 who is the criminal?

24 MR. DUNSMORE: Well, I think it's -- in any case --

25 QUESTION: And the only thing that the owner is

1 doing is paying additional taxes.

2 MR. DUNSMORE: I don't consider it paying addi-
3 tional taxes, and I think --

4 QUESTION: If the agreement is understood between
5 the prosecution, the defense and the judge, that the guilty
6 party will pay the fine of the guys that are convicted.

7 MR. DUNSMORE: Well I think we're going one --

8 QUESTION: Is that all, that's understood? Do you
9 have any problems with that?

10 MR. DUNSMORE: Well let me explain that, Mr. Justice
11 Marshall. I think we're reading too much into it and we're --
12 we're reading too much into it, because that assumes that the
13 solicitor knew that the employer was going to pay the fine.

14 QUESTION: I thought you said that that was stated
15 in open court.

16 MR. DUNSMORE: I don't believe that the solicitor
17 stated it in open court.

18 QUESTION: I didn't say the solicitor, I said some-
19 body did.

20 MR. DUNSMORE: Right, and that was the Petitioners--

21 QUESTION: And the solicitor --

22 MR. DUNSMORE: -- in this case.

23 QUESTION: -- was there, wasn't he?

24 MR. DUNSMORE: That's correct.

25 QUESTION: So he heard it, didn't he?

1 MR. DUNSMORE: Right. But I think the key, Mr.
2 Justice Marshall and the Court, is that when an employer in
3 this situation says that he will vouch for this individual --
4 particularly rehabilitative efforts -- is he not telling the
5 Court that he is going to see to it that his conduct conforms
6 to the law?

7 QUESTION: Would it be the same as a dote?

8 MR. DUNSMORE: Would it be the same as --

9 QUESTION: That the King tendered a dote says to
10 the Court that I'll pay the fine for these guys?

11 MR. DUNSMORE: I think you could say --

12 QUESTION: Would that be all right?

13 MR. DUNSMORE: I think you could say, because --

14 QUESTION: Would that be all right?

15 MR. DUNSMORE: Isn't that an indication that he's
16 got a stake in this individual and that he's going to conform
17 his conduct to the law?

18 QUESTION: And you think the Court would go along
19 with that?

20 MR. DUNSMORE: Well I don't know, but I think it's
21 a reasonable basis, a rational basis for the Court to consider;
22 that if somebody's going to pay some money out for them, are
23 they going to continue to hire this individual and why would
24 they pay the fines if they thought that the conduct -- to
25 continue, would they continue to violate the law? You know,

1 Mr. Zell says that to continue to work there would mean that
2 they would violate the terms of their probation; that assumes
3 that the conduct that the employer in this case has vouched for
4 is going to continue. And I don't think you can make that
5 assumption.

6 QUESTION: Mr. Dunsmore, I'm not sure I understood
7 why you think all of this is relevant. As the case comes to
8 us, it's been determined by your Court of Appeals that it was
9 established at the revocation hearing that these defendants
10 were not able to pay these fines. That's what the -- that's
11 what the Court of Appeals said, it said at the revocation
12 hearings it was established that none of the Appellants had
13 the financial resources to make the payments. And the Court
14 held, nevertheless, that that makes no difference, that you
15 may incarcerate these defendants for failure to pay for the
16 balance of their sentences, in one case the remainder of a two-
17 year sentence.

18 Now, isn't that the issue as it comes here?

19 MR. DUNSMORE: That is correct and the Court of
20 Appeals just said --

21 QUESTION: Well what difference does it make about
22 third parties, or what the agreement was or what the antici-
23 pation of the judge was?

24 MR. DUNSMORE: Well because --

25 QUESTION: Because the Court of Appeals took it on

1 the assumption it could not -- that it had been determined
2 that they were financially unable to pay.

3 MR. DUNSMORE: Well the Court of Appeals --

4 QUESTION: Why don't you just defend that -- which
5 you do, I'm sure, you defend that -- that even if they couldn't
6 pay, and were unable to pay, it was quite constitutional to
7 put them in jail?

8 MR. DUNSMORE: Right. And --

9 QUESTION: Isn't that your position?

10 MR. DUNSMORE: That's correct. And one of the
11 things, we're not -- there's no vindictiveness, we're not
12 increasing the sentence at all. The sentence was --

13 QUESTION: No, I --

14 MR. DUNSMORE: --you know, 12 months, \$5000 fine.
15 He could, and as Mr. Justice Rehnquist said and you said
16 earlier, he could have slap, right off the board, said, you
17 know, in you go and \$5,000 fine.

18 QUESTION: And what if the sentencing judge had
19 known at the time he imposed the -- as a condition of probation
20 -- that the convicted defendants repay \$500 a month, what
21 if he'd known at that very moment that there was no possibility
22 at all that the defendants could repay?

23 MR. DUNSMORE: Well that question is --

24 QUESTION: Isn't that just the equivalent --

25 MR. DUNSMORE: -- a little more, that's a little

1 more difficult to add, and I think that assumes--and would
2 put us in a more difficult position, because there, there's
3 an indication of vindictiveness. And as Mr. Zell said, an
4 illusory.

5 But there's no evidence of any vindictiveness at
6 all in this case. I think that is an essential matter.

7 QUESTION: What if he had been morally certain
8 that the defendants couldn't meet one or more of the other
9 conditions of probation?

10 MR. DUNSMORE: Well I agree, I think it makes it
11 far more difficult, because they are -- impugning bad faith
12 to the judge and I don't think, on the record here, there's
13 anything to impune lack of judicial integrity on the part of
14 the sentencing judge. I don't think we can go that far, to
15 say that. And then we're hypothesizing and going to all sorts
16 of realms that are not in the confines of this case.

17 QUESTION: Mr. Attorney General Dunsmore, I got
18 the impression from your adversary that the problem presented
19 by this case is somewhat unique to Georgia. Do you have that
20 same impression? And if so, --

21 MR. DUNSMORE: Well I'm not too sure of -- when he
22 said unique to Georgia -- I take it, in terms of the fact that
23 judges don't place individuals on, let's say, spend five nights
24 in the county jail or work for a health facility. I don't
25 think that's unique, because I have -- and this is outside the

1 record, I have heard from other individuals that -- where
2 individuals haven't had the fine, that you know, they said,
3 well -- like for example, in a traffic case, spend one weekend
4 a month driving around with the hospital ambulance authority
5 or something like that.

6 So, I don't think it's unique to --

7 QUESTION: But his suggestion seems supported by
8 the fact we've had two previous cases from Georgia where
9 parole was revoked because of inability to pay a fine. I
10 just don't know whether it arises in other jurisdictions or
11 not the same way.

12 MR. DUNSMORE: Mr. Justice Stevens, I couldn't --
13 couldn't tell you that. But I don't think that it -- you
14 know, that it's unique, because I do know from some limited
15 experience outside, that you know, other alternatives, depend-
16 ing on who the judge is. But what we're getting back to, or
17 what I believe we need to get back to is, the sentencing dis-
18 cretion of the judge and the fact that other alternatives are
19 available or he could consider other alternatives, is it
20 unconstitutional to consider financial resources, and is it
21 unconstitutional to enforce the terms of the sentence which
22 is prescribed by law? And that's exactly what we're faced
23 with, and we say it's not.

24 And we say, particularly, that it's not, because
25 there is some element of deception in this case. It was,

1 Mr. Justice Marshall said, you know, leading the judge down
2 the path. I, as attorney, and even as a citizen, would find
3 that somewhat disturbing and irreprehensible that somebody
4 sits down and misinterprets or misleads the Court, particularly
5 in the context that we're brought up -- particularly the aura
6 of the Court -- I think most criminal defendants and most
7 individuals, when they are faced in a court situation, tend
8 to be honest. Now, and I'm not supposing this case that the
9 defendants were, you know, were less than honest, but they
10 didn't need to speak up and say the third party is paying the
11 fine.

12 I said that after 19 months, particularly on
13 October 23, 1978, or even during that period of time, why
14 didn't they go to their attorney and say look, there's just
15 no way we can pay it. Why wait three months until the solic-
16 itor goes in and says I want an order to revoke your probation?
17 Where is the good faith effort on their part? And I think
18 that's fundamental. I think we need to reach that issue
19 and I think in reaching it, we would hope that the Court
20 would say that the trial judge in this case did not abuse his
21 discretion. And we thank you for that.

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

24 (Whereupon, at 11:59 o'clock a.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATE

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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. 79-6027

Raymond Wood, et al.

v.

Georgia

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

BY: Will J. Wilson

William J. Wilson

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