ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-6756

TITLE MELVIN E. TUTEN, Petitioner v. UNITED STATES

PLACE Washington, D. C.

DATE March 1, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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MELVIN E. TUTEN, :

Petitioner :

v. : No. 81-6756

UNITED STATES :

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Washington, D.C.

Tuesday, March 1, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:02 p.m.

APPEARANCES:

LINDA GILLESPIE STUNTZ, ESQ., Washington, D.C.;
on behalf of the Petitioner.

BARBARA E. ETKIND, ESQ., Deputy Solicitor General,
Office of the Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Ms. Stuntz, you may proceed whenever you are ready.

ORAL ARGUMENT OF LINDA GILLESPIE STUNTZ, ESQ.,
ON BEHALF OF PETITIONER

MS. STUNTZ: Thank you, Mr. Chief Justice, and may it please the Court.

This is a criminal case involving the application to the particular facts of this case of Section 5021(b) of the Federal Youth Corrections Act of 1950 and Section 3204 Chapter 22 of the District of Columbia Code, in particular a provision of that section multiplying by a factor of ten the penalty for repeat offenders. These provisions are set forth at pages 2 and 3 of petitioner's brief.

Th question before the Court is: Whether petitioner may be sentenced as a recidivist under Section 3204 based on a conviction for which he served a sentence of 2 years of probation pursuant to Section 5010(a) of the Federal Youth Corrections Act and was granted an unconditional discharge.

The Fifth Circuit Court of Appeals which answered a similar question in the negative is in conflict with the District of Columbia Court of Appeals, the court below, which answered this question in the

affirmative.

Petitioner maintains that the District of Columbia Court of Appeals is in error and that his sentencing as a recidivist was improper for two independent reasons: Number one, his earlier Federal Youth Corrections Act conviction was set aside pursuant to Section 5021(b) when he received his unconditional discharge; and number two, whether or not it was technically set aside pursuant to Section 5021, it is not a proper basis upon which to impose a recidivist penalty under Section 3204.

The facts are not in dispute. On February 12, 1971, petitioner, then 19 years of age, entered a plea of guilty in the District of Columbia Court of General Sessions to the charge of carrying a pistol without a license, in violation of 22 D.C. Code Section 3204.

The imposition of sentence was suspended, and petitioner was placed on probation under Section 5010(a) of the Federal Youth Corrections Act for a period of 2 years. Contrary to established Probation Department procedures, petitioner's term of probation was allowed to expire without judicial attention to the question of whether or not he should have been discharged prior to the end of his two-year term.

At the end of his term in 1973 petitioner was

granted an unconditional discharge. However, no certificate was issued setting aside his conviction pursuant to Section 5021(b) of the Youth Act.

On June 19, 1980, a two-count indictment was filed charging petitioner with assault with a dangerous weapon, a stick, and carrying a pistol without a license, after having been previously convicted of carrying an unlicensed pistol. Both offenses were allegedly committed on November 23, 1979.

Prior to petitioner's trial, the government informed the Court below, pursuant to D.C. law, that petitioner had previously been convicted of carrying a pistol without a license and was therefore subject to the increased recidivist penalty provided by Section 3204. The previous conviction relied upon by the government was the same 1970 offense for which petitioner had been sentenced under the Federal Youth Corrections Act.

On November 27, 1980, a jury found petitioner not guilty of assault with a stick but guilty of carrying a pistol without a license. On January 26, 1981, petitioner was sentenced to a felony term of not less than two nor more than six years. Had he been sentenced as a first-time offender pursuant to Section 3215 of the D.C. Code, the maximum sentence that he

could have been given is one year imprisonment.

Petitioner appealed his sentence as contrary to Section 5021(b) of the Youth Act and of the construction placed on that section by the Fifth Circuit Court of Appeals in United States versus Arrington.

However, the District of Columbia Court of Appeals affirmed. It found Arrington to be based on unpersuasive authority and held that under Section 5021(b) only those youth offenders who are unconditionally discharged by a court prior to completing a Youth Act probationary sentence are entitled to have their convictions set aside. The Court concluded that a conviction which was not set aside was a proper basis for the recidivist sentence that petitioner received.

On October 12, 1982, this Court granted a petition for writ of certiorari to review the decision of the District of Columbia Court of Appeals.

The gist of petitioner's argument is that the use of his 1971 Federal Youth Act conviction to trigger the felony recidivist penalty contained in Section 3204 of the District of Columbia Code was improper on two independent grounds: first, the 1971 conviction had been automatically set aside pursuant to Section 5021(b) by petitioner's unconditional discharge from probation;

and second, whether or not it was technically set aside, it may not properly be used to trigger a recidivist penalty. I would --

CHIEF JUSTICE BURGER: Ms. Stuntz, would your second ground require us to interpret differently than did the D.C. Court of Appeals a statute dealing primarily with local matters in the Distrct?

MS. STUNTZ: Mr. Justice, the District of Columbia Court of Appeals, as I understand its treatment of that issue, which was very perfunctory, felt it was not a matter for its determination as a court, but that the issue was better addressed to Congress.

QUESTION: Well, that's one way of telling you that you lose, I suppose.

MS. STUNTZ: I do not think there would be involved any alteration of their interpretation. They did not approach the question that fully.

QUESTION: Is it an independent state ground for decision?

MS. STUNTZ: Your Honor, since it -- since this question involves the interrelationship of both statutes, it would be petitioner's position that there would -- could be no independent state ground since it necessarily involves the construction of both the Federal Youth Corrections Act and the District of

Columbia provision.

QUESTION: But supposing this case had come to us from New York or Illinois and the state court had said, we are going to treat the Federal Youth Corrections Act as a proper basis for a state recidivist penalty. Now, that would clearly be an adequate state ground, wouldn't it? And isn't that pretty much what this Court did?

MS. STUNTZ: To the extent that that interpretation of the Federal Youth Corrections Act, which is plainly a matter for this Court's purview, differed with a matter of this Court's interpretation, I should think it would not be an adequate State ground.

QUESTION: Do you think we could prevent a State court from treating a Youth Corrections Act conviction as a basis for its own recidivist statute? Couldn't New York pass a statute that says a second conviction will result in an enhanced penalty and we shall for this purpose treat any Federal convication whether youth or adult, as a first conviction? They could do that, couldn't they?

MS. STUNTZ: Yes, Your Honor. I believe that they could.

QUESTION: Well, isn't that pretty close to what has happened here?

MS. STUNTZ: That is not the primary basis for this Court's decision below --

QUESTION: Well, you say they --

MS. STUNTZ: -- as I understand it.

QUESTION: -- didn't articulate it that way, but that's the net effect of the result reached, is it not?

MS. STUNTZ: It may be, but as applied to this particular case, but I believe the precedential value that this case would set in terms of its construction of the Youth Act Section 5021(b) and when set aside occurs would have an impact far beyond this particular jurisdiction.

QUESTION: At any rate, that's your second point, isn't it? I take it you'd probably want to argue your first point first.

MS. STUNTZ: Thank you, Your Honor. I will proceed to that.

The government contends that the language of Section 5021(b) is entirely clear and compels the conclusion that a Youth Act conviction will be set aside only when the youth has been discharged prior to the expiration of his probationary sentence. Petitioner was not discharged prior to the end of his 2-year probationary term. Therefore, the government reasons in

the Court below, that this conviction was not set aside.

However, Section 5021(b) does not provide for the set-aside of the conviction of a youth offender who is discharged before the expiration of his sentence or whatever sentenee it is that's imposed upon him.

The language of the statute is that automatic set-aside shall be granted to those youth offenders who are discharged prior to the expiration of the maximum period of probation, theretofore fixed by the Court.

Now, as with any question of statutory construction, it is necessary to go back to the history, structure, and underlying policies of the Youth Act itself, at least briefly because I know the Court is familiar with these matters, to see those -- what those who drafted this language intended to do.

In its exhaustive review of the Federal Youth Corrections Act in Dorszynski versus United State, this Court found that the principal purpose of the Youth Act is to rehabilitate persons who because of their youth are especially vulnerable to the dangers of recidivism. In furtherance of this princpal purpose, sentencing judges were authorized to choose from a variety of sentencing options.

Under Section 5010 of the Act, a youth offender may be committed to the custody of the Attorney General

for a period up to six years or such longer commitment as may be authorized for an adult violator. The youth offender may also be placed on probation with the execution or imposition of his sentence suspended. Or the youth may be senetenced as an adult should the Court find he would not benefit from the Youth Act treatment.

The drafters of the Federal Youth Corrections Act provided a powerful tool to the Youth Act Division to be used in achieving this principal rehabilitative purpose. This was the Division's discretion to discharge committed persons unconditionally before it was statutorily required that they do so under the Act because upon such discharge the conviction of the youth would be automatically set aside.

It was this provision, Section 5021(a), that was before the United States Court of Appeals for the Fifth Circuit in United States versus Arrington. There the Court held that a youth offender's unconditional discharge after satisfactorily completing a six-year sentence under Section 5010(b) of the Youth Act set aside his conviction under Section 5021(a).

As a result, the offender could not be convicted of violating the Federal law which prohibits the possession of firearms by a convicted felon, 18 U.S.C. Section 1202.

Citing the Court's decision in Dorszynski, the Fifth Circuit stated, if a youthful offender has been unconditionally discharged, the disabilities of a criminal conviction are completely and automatically removed. Indeed, the conviction is set aside as if it never had been.

The government would have the Court discard Arrington as an aberration, not based upon a complete reading of Section 5021. According to the government and the Courts below, Arrington's conviction was not set aside because Arrington was not released prior to the end of his Youth Act sentence.

The Fifth Circuit determined, however, that because Arrington was given a sentence less than that which he could have been given, his unconditional discharge following the completion of that lesser term earned him the set-aside of his conviction under Section 5021(a).

The Fifth Circuit's construction of Section 5021 is true to the distinctive character of the Federal Youth Corrections Act as a tool of rehabilitation rather than one of retribution.

Petitioner's case is even stronger than John Arrington's. Arrington had been committed to the custody of the Attorney General under Section 5010(b)

and had received unconditional discharge after completing the six-year maximum term provided by Section 5010(b). Petitioner, on the other hand, received unconditional discharge after serving a probationary term of only two years.

Now, when the Youth Corrections Act was enacted, no provision whatever was provided whereby youths placed on probation rather than committed could obtain the set-aside of their convictions. This waited until 1961 when Section 5021(b) was added to extend the same conviction set-aside benefits to youths serving Youth Act probation as had been available to youths committed under the Federal Youth Corrections Act.

Unlike the terms of commitment, however, the Federal Youth Corrections Act specifies no maximum term of probation at the end of which unconditional discharge must occur, nor does it provide for mandatory conditional release prior to the end of that maximum term as is the case for committed youth offenders.

The government contends that according to the plain language of the statute the youth must be released prior to the term of probation initially imposed in order to qualify for the set-aside of his conviction. This reading of the statute, however, ignores the term "maximum" even though the legislative history makes it

clear that the word "maximum" is in Section 5021 both (a) and (b) for a reason.

The reason is to provide a benchmark by which the youth eligibility for the set-aside of his conviction can be measured. Unconditional discharge prior to that benchmark grants automatic set-aside. What is the maximum term of probation theretofore fixed as is discussed in petitioner's reply brief? This is not an easy question to answer.

Petitioner maintains, however, that the drafters of the Federal Youth Corrections Act intended unconditional discharges occurring before six years or such longer period as an adult term may provide to carry with it the set-aside of the conviction underlying that term.

Acceptance of the government's contention would lead to a number of anomalous results. An offender discharged before the end of an extended period of probation would be treated better than one discharged at the end of a brief initial period of probation.

QUESTION: But isn't the thought, Ms. Stuntz, that if someone sentenced under the Youth Corrections Act is discharged prior to the term for which they have probation, however long, that's a recognition of kind of a specially good rehabilitation, whereas if the person

simply serves out the term, it's thought that's probably about as expected but no big pluses?

MS. STUNTZ: Your Honor, I think that is precisely why the statute was written as it was, to, as the government puts out and as petitioner agrees, reward not just average adjustment but -- but good behavior, special response to the Federal Youth Corrections Act program.

There is, however, in the language of the statute the term "maximum," in recognition of the anomalies that may result were a person discharged after two years not allowed the set-aside of his conviction and yet a person discharged after five years allowed that set-aisde. The term "maximum," which relates back, petitioner contends, to the six years in the original statute, provides a solid benchmark by which all behavior under Federal Youth Corrections Act treatment may be measured, especially in this case where there never was an opportunity for petitioner to be discharged before the end of his two-year probationary term due to the failure of the Probation Department to alert the sentencing Judge to the expiration of his term of probation.

The government's interpretation of Section 5021(b) violates the foremost intent of the drafters of

the Federal Youth Corrections Act: to rehabilitate those youths who can be reached by giving those who respond to Federal Youth Corrections Act treatment a fresh start.

Turning now to the second independent grounds for reversal --

QUESTION: How does the fresh start concept fit an acknowledged recidivist now, going to the policy underlying the statute?

MS. STUNTZ: The question --

QUESTION: Assuming -- assuming he was entitled to some special consideration for his first offense, what justification is there for any special consideration for him for the second offense?

MS. STUNTZ: Your Honor, I agree that the benefit of hindsight often would change the application of a --

QUESTION: Well, do not --

MS. STUNTZ: -- search warrant or -- or --

QUESTION: -- do not Judges in sentencing take -- use hindsight to -- suppose a Judge were totally free -- this is not directly related to your case -- but suppose the Judge were entirely free, don't you think a Judge would treat him as a second offender if there were none of the points you raise?

MS. STUNTZ: I am sorry, Your Honor, I am not sure I understand the --

QUESTION: Well, the Judge is going to look at the total record. He looks at a sentencing probation report, presentence report, and he finds the person has committed other offenses. Now, suppose he had committed an offense but had not been prosecuted for one reason or another. Wouldn't the Judge, any sensible Judge making the sentence, take that into account?

MS. STUNTZ: I think that is precisely why, Your Honor, the set-aside provision was inserted and --

QUESTION: To prevent Judges from taking it into account?

MS. STUNTZ: That -- whether or not the set-aside completely expunges the record is an issue which has not yet been finally adjudicated by the Court, this Court or even the Courts below. They are in disagreement on that matter, and I do not believe it is an issue that needs to be determined today.

But the question is not whether petitioner's commitment of a crime years later somehow goes back and -- and disqualifies him from the set-aside of his conviction.

QUESTION: Even when it's -- even when it's practically the same crime?

MS. STUNTZ: Whether -- whether it is -- whether or not it is the same crime, Your Honor, the question before the Court is did he qualify pursuant to the statutory criteria set out in the Federal Youth Corrections Act. That he committed a crime years later is -- is unfortunate. And the Judge at that time has the right to use his sentencing discretion in whatever way he deems best. The question here is was that conviction on the books at the time the Judge ten years later when the second crime was committed.

Petitioner's position is, according to the language of the Federal Youth Corrections Act and as Arrington held, that conviction was set aside and was not available to be used to trigger the increased recidivist penalty.

Turning to the second independent grounds for reversal, petitioner argues that whether or not his conviction was set aside, it's not proper to use it as the basis upon which to impose a recidivist penalty. Federal Youth Corrections Act convictions are very different kinds of creatures. Youths may be sentenced to longer terms under the Federal Youth Corrections Act than -- than may an adult.

QUESTION: Ms. Stuntz, you say it is not proper to use it. Do you have some statutory frame of

reference in mind when you say that? That the -- is it the general recidivist statute was not intended to incorporate it or there is some constitutional problem or is it a common-law observation?

MS. STUNTZ: Your Honor, I rely primarily upon the rule of lenity. There is no legislative intent that in the D.C. Code Section 3204 that Federal Youth Corrections Act convictions be counted there. In the absence of such legislative intent, it has been the long-held doctrine of this Court that the imposition of a harsher penalty which presumes such intent --

QUESTION: Well --

MS. STUNTZ: -- is improper.

QUESTION: Do you concede that at least by implication the D.C. Court of Appeals has resolved the issue of legislative intent against you?

MS. STUNTZ: The D.C. Court of Appeals has certainly, at least by implication, resolved the issue of the legislative intent of Section 3204.

QUESTION: Which is the one you want construed according to the rule of lenity?

MS. STUNTZ: What I am asking the Court is not just 3204 but also the Federal Youth Corrections Act, because I think it's important to keep in mind the policies of both acts to determine whether applying them

together, as they were in this case, makes sense and serves the policies of either one. It is petitioner's position that such use does not.

In conclusion -- and I would respectfully ask that the remainder of my time be available for rebuttal --

QUESTION: Very well.

MS. STUNTZ: -- petitioner would ask that for these reasons and the reasons set forth in his briefs, the decision of the District of Columbia Court of Appeals be reversed and that his felony sentence be vacated and his case remanded for resentencing pursuant to Section 3215 of the D.C. Code as a first offender.

QUESTION: But he is no longer a youth? He is no longer a youth?

MS. STUNTZ: That's correct, Justice.

QUESTION: He's 27 years old when he was convicted, he was 27 years old?

MS. STUNTZ: That's correct.

CHIEF JUSTICE BURGER: Ms. Etkind, you may proceed whenever you are ready.

ORAL ARGUMENT OF BARBARA E. ETKIND, ESQ.,
ON BEHALF OF RESPONDENT

MS. ETKIND: Thank you, Mr. Chief Justice, and may it please the Court:

We believe that the question presented by this case, whether petitioner is entitled to a set-aside of his conviction under the Federal Youth Corrections Act, is answered in the negative by the plain language of the statute.

18 U.S.C. 5021(b) provides that a court may unconditionally discharge a youth offender from probation "prior to the expiration of the maximum period of probation theretofore fixed by the Court which discharge shall automatically set aside" the youth offender's conviction.

Here petitioner was sentenced to two years' probation under the Youth Corrections Act. It is undisputed that he completed the entire probationary term. Accordingly, he was never unconditionally discharged prior to the expiration of the maximum period of probation theretofore fixed by the Court.

QUESTION: If he were discharged one day before the expiration, he would satisfy the statute?

MS. ETKIND: Yes, he would.

QUESTION: What do you think is the purpose of the statute?

MS. ETKIND: I think the purpose of the statute, Congress' purpose, was to hold out to youth offenders the possibility of a set-aside as an

inducement to fully rehabilitate themselves and to take --

QUESTION: Even though it's one day before?

MS. ETKIND: Well, I think -- I think it may have to be one day before. Congress was looking for some evidence of this rehabilitation, and the evidence would be an early set-aside whenever that would come, particularly in the case of a probation with a short sentence, it might take nearly the whole sentence to rehabilitate.

Petitioner was never unconditionally discharged prior to the maximum period of probation. He therefore was never entitled to the set-aside, and the government was fully intent -- was fully entitled to use it as a basis for the subsequent recidivist penalty.

Petitioner attempts to create ambiguity where none exists in this statute by focusing on the statute's use of the word "maximum." and on the absence of any language in the statute such as "the sentence imposed on him."

But it is clear from the phraseology of the statute, the period of probation theretofore fixed by the Court, that Congress was talking about the sentence that would be imposed on the defendant. And Congress could not have more clearly expressed that its use of

the word maximum referred to "the maximum period of probation theretofore fixed by the Court."

In addition, petitioner now suggests that "maximum" may refer to -- may refer to the available sentence or the six-year sentence under the YCA as the maximum. But in fact, when a court sentences a probationer, the maximum to which he can be sentenced under 3651 in the Federal Courts and also in the D.C. Courts is five years' probation. So according to petitioner's theory, any -- any probationer would ultimately be entitled to set-aside relief.

As I mentioned to Justice Blackman, it was Congress' purpose in -- in -- in holding out the possibility of a set-aside to induce probationers, to induce all youth offenders, to take advantage of the treatment and guidance that was offered by the YCA program. Accordingly, any construction of the statute that makes the availability of set-aside relief turn on the initial sentence as imposed would -- would thwart that congressional purpose.

And it's for that reason, as well as the more significant fact that its conclusion flies in the face of the statutory language, that the Arrington decision on which petitioner relies and which is the only decision contrary to the holding below is of no

persuasive force at all.

While the case -- while this case here presents -- involves the set-aside provision applicable to probationers, Arrington involved the analogous set-aside provision applicable to committed youth offenders; that is, incarcerated youth offenders.

That section provides, "Upon the unconditional discharge by the commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside."

Notwithstanding this clear statutory language, the Fifth Circuit in Arrington held that the defendant there, who had completed his --the six-year sentence that was imposed upon him was entitled to a set-aside. That Fifth Circuit decision represents nothing less than a holding that every defendant who is sentenced under the Youth Corrections Act will ultimately be entitled to a set-aside.

Petitioner complains that we are -- that we interpret the Arrington decision too broadly, that really all that the Fifth Circuit was holding was that any youth offender who was committed to a sentence less than that to which he could have been committed will be entitled to a set-aside.

But there is no basis for petitioner's reading of the Arrington decision. In the first place, the Fifth Circuit never articulated such a limited ruling. Indeed, it never even discussed the critical statutory language prior -- before the expiration of the maximum term imposed upon him.

And moreover, the petitioner's reading of the Fifth Circuit's decision makes no sense at all, as a hypothetical will show. If you take two defendants, both of whom are sentenced to six years youth -- to six years under 50 -- Section 5010(b) of the Youth Corrections Act, one of the defendants has committed a string of murdered, the other one has been convicted of loitering.

Under -- under petitioner's reading of the Arrington decision, the only defendant who would be entitled to set-aside relief would be the mass murderer because only he could have been sentenced to a greater sentence; that is, under Section 5017(c), he could have been sentenced to the maximum -- to a youth offender sentence equivalent to the maximum sentence an adult could have received.

But in any event, either reading of the Arrington decision ignores the critical statutory before the expiration of the maximum sentence imposed on him.

Moreover, either reading makes the unavailability of set-aside relief turn on the sentence as initially imposed, and therefore it thwarts the congressional purpose of it holding out the set-aside as an inducement to the youth offenders to take advantage of YCA treatment in correctional programs.

If the Court has no further questions, I will rely on argument.

CHIEF JUSTICE BURGER: Very well. Do you have anything further, Ms. Stuntz?

ORAL ARGUMENT OF LINDA GILLESPIE STUNTZ, ESQ.,
ON BEHALF OF PETITIONER -- Rebuttal

MS. STUNTZ: Thank you, Your Honor.

Petitioner does not maintain that any probationer would be entitled to set-aside relief. As the Justice pointed out, it is plain that Congress was looking for evidence of rehabilitation and that this was necessary in order to qualify for the set-aside of the conviction. It was not to be a benefit indiscriminately bestowed upon everyone under the Federal Youth Corrections Act.

In looking for the evidence of rehabilitation, the government would suggest, according to a strict reading of all of the statute except one word, that it must have happened one day or five days or any time

prior to the period of that probationary term. Aside from the fact that, as we know in this case, there never was even an opportunity for that to happen, this turns the rehabilitative purposes of the Act on its head.

The more reasonable reading, more in line with the policy of the Act, a more better gauge of evidence of rehabilitation would be was the petitioner, was the youth offender discharged prior to the six years under which -- specified in Section 5010(b) of the Act?

If the Court would determine that in fact the maximum is the five-year probationary term provided in the Federal probation statute, that would be acceptable as well. But there is most definitely a reference in the statute to some maximum as the benchmark. This is to how the evidence of rehabilitation is to be determined. And only if that evidence is demonstrated would set-aside be in order.

In this case, that evidence is demonstrated. And petitioner would urge that conviction and the decision of the Court of Appeals below be reversed. Thank you.

CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

(Whereupon, at 2:53 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that th attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

Melvin E. Tuten, Petitioner v. United States # 81-6756

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BY Pierce Hammond

(REPORTER)