ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-328

TITLE JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION, Petitioner v. GEORGE JOHNSON

PLACE Washington, D. C.

DATE April 16, 1984

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(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

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JAMES MABRY, COMMISSIONER, :
ARKANSAS DEPARTMENT OF :
CORRECTION, :
Petitioner, :
v. : No. 83-328
GEORGE JOHNSON :

- -x

Washington, D.C.

Monday, April 16, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 o'clock a.m.

APPEARANCES:

JOHN STEVEN CLARK, ESQ., Attorney General of Arkansas, Little Rock, Arkansas; on behalf of the petitioner.

JERROLD J. GANZFRIED, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the U.S. as amicus curiae.

RICHARD QUIGGLE, ESQ., Little Rock, Arkansas; appointed by this Court.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Mabry against Johnson.

Mr. Attorney General, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN STEVEN CLARK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CLARK: Mr. Chief Justice, and may it please the Court, the state appears here as a petitioner because of the importance it attaches to the resolution of this case on its merits due to the split in the circuits and that impact on the criminal justice system. That issue, as we define it, is, is the defendant constitutionally entitled to specific performance of a plea offer once made, then withdrawn, prior to entry of a guilty plea or a showing of detrimental reliance or prejudice.

QUESTION: But after his acceptance.

MR. CLARK: Yes, Your Honor. I will argue that a better rule of law and a better policy is that specific performance is only constitutionally entitled when that defendant has made a showing of detrimental reliance or prejudice, and that there is an adequate remedy at law, and that a rigid rule, the rigid rule enunciated by the Eight Circuit Court of Appeals below,

has the effect of stripping the prosecutor of any discretion, the trial court of any discretion, and perhaps most importantly, creating a constitutional right and a unilateral expectation of the defendant.

QUESTION: Under Arkansas law, who makes the final decision on sentences?

MR. CLARK: The trial court, Your Honor.

QUESTION: And on the acceptance of pleas?

MR. CLARK: The trial court, Your Honor, would consider the plea offer that was made, and would decide whether it was acceptable and either accept it or not.

QUESTION: He can reject it if he wishes?

MR. CLARK: Yes, sir, the trial court may reject the offer.

The facts below briefly are these. Fourteen years ago, in 1970, the defendant was charged with murder in the first degree, burglary, and assault with intent to kill. He was convicted on the charge of murder and received life imprisonment. He was convicted on the charge of burglary and assault with intent to kill and received a sentence of 21 years and 12 years respectively, which were to be served concurrently.

In 1972, the Arkansas Supreme Court reversed the murder conviction for inadequate jury instruction, and defendant was appointed a counsel. He was

arraigned, and a trial date was set. Late Friday afternoon, October 27th, 1972, the deputy prosecuting attorney communicated to the defense counsel a plea offer, that offer being, if the defendant would plead guilty to 21 years concurrent to the charge of accessory after felony murder, a plea could be stricken, a recommended plea could be agreed to.

Defense counsel took that offer to the defendant at the penitentiary the next day, and he agreed. The very next working day, Monday, October 30th, defense counsel communicated to the deputy prosecuting attorney his agreement, and was informed there was a mistake, that the plea recommendation would have to be for a sentence of 21 years consecutive rather than concurrent.

Defense counsel or defendant had no further comment to either the prosecutor or to the court until November the 8th of that year, when the defendant appeared before the court for trial on the charge of murder with a plea of not guilty. That trial ended in mistrial. A subsequent date was set.

It was continued, and the in February of 1973, the defendant, in the presence of a jury, withdrew his plea of guilty to the charge of murder in the first degree, entered voluntarily a plea of -- excuse me,

withdrew his plea of not guilty to murder in the first degree, entered a plea of guilty to the charge of accessory after felony murder, and was sentenced to 21 years consecutively.

QUESTION: General Clark, is the defendant now released from custody?

MR. CLARK: Yes, Your Honor. The defendant is on parole now.

QUESTION: And served how much time?

MR. CLARK: Defendant was sentenced in 1970 and '71, and was released in 1977, I believe -- '79, Your Honor.

QUESTION: And the sentence he had been given was a total of how many years?

MR. CLARK: For the charge of burglary and assault with intent to kill, 21 years for burglary and 12 for assault with intent to kill, and that was the sentence he was served. He is still under the subject and control of the Board of Pardons and Paroles of the state of Arkansas, and his parole eligibility date for absolute release would be March 17, 1988, or March 17, 2009, depending on the sentence.

QUESTION: In Arkansas, does a plea agreement have to be entered into in writing ultimately before it is put into effect?

MR. CLARK: There is not a requirement in the state statute, Your Honor.

QUESTION: But it does have to be approved by the judge?

MR. CLARK: The trial court must approve any plea that has been offered to a defendant. This Court has recognized that plea bargaining is an inherent part of that criminal justice process, and inherent in any plea bargaining agreement is the requirement of fundamental fairness.

In Santobello this Court enunciated that a defendant was only entitled to specific performance where there had been that showing of detrimental reliance or prejudice. In the case at bar, there has been no showing of reliance or prejudice, and fundamental fairness requires that the benefit inure equally to the state as it does to the defendant.

QUESTION: Where was that in Santobello that there was reliance on --

MR. CLARK: Excuse me, Your Honor?

QUESTION: You said that the defendant in Santobello had relied on the plea bargaining.

MR. CLARK: Yes, Your Honor.

QUESTION: Is that in the opinion?

MR. CLARK: The defendant relied by entering a

plea of guilty.

QUESTION: But it is not in the -- the opinion doesn't say that, does it?

MR. CLARK: Your Honor, as I understand the facts, the defendant did enter a plea of guilty.

QUESTION: The opinion doesn't say that, does it?

MR. CLARK: No, Your Honor, it does not.

QUESTION: It does?

MR. CLARK: It does say that. Yes, Your Honor. Excuse me.

QUESTION: It says that he relied on it?

MR. CLARK: He relied by virtue of entering a plea of guilty.

QUESTION: And that that prejudiced him?

MR. CLARK: That shows that reliance. Yes, Your Honor. In this instance, in the case at bar, Mr. Johnson did not enter any plea of guilty. In fact, the plea bargaining was revoked on Monday, when there had been a mistake indicated.

QUESTION: We are talking about the bargaining between the man and the prosecutor.

MR. CLARK: Yes, Your Honor.

QUESTION: That is what Santobello is about, and that is what this case is about, and I'm not too

sure Santobello helps you that much.

MR. CLARK: Your Honor, I would submit to you that Santobello does help in the sense that unless the defendant shows there has been some detrimental reliance or some prejudice. In this instance the facts do not show that. In this instance, the defendant was offered a bargain. There was a mistake, an honest mistake.

As soon as that offer was accepted and communicated back to the prosecutor, to be known that there was a mistake, the prosecutor gave evidence that there was a mistake. At that point, the defendant entered a plea of not guilty, went to trial on the plea of not guilty. The defendant did not raise at any time to the court or to the prosecutor that there had been any bad faith, there had been any indication by the prosecutor of vindictiveness, just indicated that there was a mistake.

In fact, I think the mistake is fairly self-evident if you logically conclude what occurred. Here was the defendant serving 21 years for burglary and 12 years for assault with intent to kill, doing time. He had been tried once for murder in the first degree, convicted, and sentenced to life. Now, here was the state coming forward with a plea bargain which said you could serve 21 years concurrent. It would have been as

if the deputy prosecutor had said, would you accept a plea bargain in which we will drop all charges against your defendant.

And so I think it is obvious from the logical conclusion that there was a mistake here, and that in this instance the defendant was not prejudiced by that mistake, because he did have an adequate remedy, which was trial by jury.

QUESTION: General Clark, the Court of Appeals seems to have concluded that the writ of habeas corpus should issue unless the state resentenced the defendant in accordance with the concurrent sentence plea proposal. Do you know why the Court of Appeals made nothing of the fact that the trial judge in Arkansas had never approved the plea bargain?

MR. CLARK: Your Honor, I do not know why they did not. That is the issue that brings the state to this petition, for the reason that that erodes all discretion of the trial judge. It is such a rigid, inflexible rule that there is no benefit, no mutuality of advantage that goes and flows to the state from plea bargaining for the very reason that you are bound only to the unilateral expectation of the defendant, and that there is some mutuality of advantage that is a part of the plea bargaining process that inures to the state.

QUESTION: But what if the Court of appeals, instead of saying what it did, it said, until the state submits the plea bargain to the judge who tried the case, saying the prosecutor is bound but not the trial judge. Would you still -- Under your theory it is still objectionable, isn't it?

MR. CLARK: Yes, Your Honor, it is still objectionable. That obviously is a better remedy than what we have now, but it is still objectionable, because of the split in the circuits and the fact that predicated on this unilateral expectation of the defendant, and I think we find a situation where two disastrous results occur, the first of which is that we have given rise to a constitutional right to a defendant who has been engaged in the plea negotiation process, which this Court has enunciated that plea bargaining is not a constitutional right.

So, for those defendants that are not involved in the plea negotiation process, they don't have the same issue to bring to an appellate -- for an appellate remedy of post-conviction remedy. Secondly, the effect of depending solely on the unilateral expectations of defendant can create a situation where literally each case on its merits will have to be reviewed through the post-conviction remedy and appellate process without

being able to set a standard by which they can be judged against, because each defendant will have some expectation, I didn't believe that I was going to be sentenced to 21 years consecutive, and you get into this Court having to ask of events of five, ten, and fifteen years ago, what did one deputy prosecuting attorney say to one deputy public defender? What was the context of the five to seven minute conversation? What in fact happens if the defense counsel makes a mistake?

So it seems to me that the decision below was a very important decision in that it erodes the flexibility of fundamental fairness as it applies to the criminal justice system, and as I have said there would be no benefit that would have flown to the state if you follow the strict adherence of the court below, because Johnson would not be serving any time for the crime of murder.

And although the court below says it does not rely on principles of contract, it does seem to adhere to some contracting theory in the sense that there is an offer and there was an acceptance, and therefore the state should be bound. I submit to you that what we are discussing here are not issues of contract, and though the analogy may be important from the standpoint of being somewhat instructive, we are dealing with

constitutional rights.

QUESTION: General Clark, just so I understand your position, in this particular case you say it would have been silly to make this offer, because it really was no punishment at all.

MR. CLARK: Yes, Your Honor.

QUESTION: But you would make the same constitutional argument if they had offered him 15 years instead of life or something like 15 years consecutive and then later changed their mind and decided it ought to be 21 years consecutive.

MR. CLARK: Yes, sir, I would make the same argument if you withdraw the plea if no prejudice had attached, there had been no detrimental reliance.

I would also to this Court that as I said, that the result of this decision in terms of contract is one which this -- we are talking about constitutional rights and the deprivation of liberty, and that if you were just going to analogize simply to contract, where one party negotiates with another, you realize that both parties have the power to enforce that agreement, and in this instance the criminal defendant has the right to withdraw that plea, even though there has been a bargain struck.

The offense to the dignity of the state in

terms of prosecution and the very narrow rigid rule applied by the Eighth Circuit is this. Take this situation. Had the prosecutor offered 20 years, 25 years, to be specific, and the defender had heard only five and communicated that five-year offer to his defendant, he would have said, I accept, would have communicated back to the prosecuting attorney, we accept the plea of five years, but in fact it should have been communicated to the one who originally made the offer, who was out sick, to a second one, and they agreed.

And then the prosecution went forward to take a statement from the defendant showing some reliance on his part in which he perhaps implicated other accessories to this crime. Then in fact only at the time that we appeared before the bar of justice of the court at the trial court level would we find the situation where the defendant could have raised the issue of he had unilaterally expected a five-year sentence instead of a 25-year sentence, and his expectation was predicated on the argument of his defense counsel, the mistake there, and that if you follow the rule of the Eighth Circuit below and its rigid application, you could contend that that bargain must be struck, and in fact that defendant is entitled to that when the mistake was not made by the government

whatsoever.

The argument also has been made that the government must act scrupulously. If you can't trust the government, who can you trust? Well, in fact, the better policy, of course, is that in any plea bargaining situation between the prosecution and the defense, every offer and agreement should be made, but the fact also is that we do not deal with technical precision. People do make mistakes. And the trust of the defendant is not based really in the prosecutor, because the prosecutor is the defendant's advocate. The trust of the defendant is predicated in his belief in the court.

And so therefore the decision below does not fashion an adequate remedy in the sense of mutuality of advantage that it could gain through the plea bargaining process, because the court needs the discretion to review these plea bargaining negotiations and then order, one, specific performance or, two, recision, which gives that defendant an adequate remedy, which is trial by jury.

Excuse me, Your Honor.

I think it is important from the perspective of the state to indicate that unless we have a standard enunciated by this Court, a standard which indicates that without some showing of bad faith, without some

showing of detrimental reliance, that we have an unworkable triple justice system in which the state must function, because virtually in the calendar year 1983 just in the United States District Courts alone there were some 35,000 defendants who plead guilty or nolo to criminal charges.

Of that number, some 29,000 -- excuse me, were charged with criminal offenses. Of that number, some 29,000 either pled guilty or in fact pled nolo. So you have 30,000 out of 35,000 coming into the system by virtue of plea bargaining and the negotiation process, and a mutuality of advantage must flow to the state. It must flow to the state or the state finds itself continually in litigation as to the expectation of the defendant.

The remedy that the state would beseech this Court and urge this Court to give is that standard, the showing of bad faith, the showing of some detrimental reliance, and that that is not just mistake, because mistake is not enough in that if you follow just mistake there is no punishment, for instance, in this case at bar, that would flow to the defendant, and no respect for the dignity of the people of the state of Arkansas for an offense committed against its dignity and its citizenry.

I would conclude, Your Honor, by simply saying this. Fundamental fairness and mutuality of advantage of plea bargaining require that a punishment must fit the crime, that the state must have the ability to deal equally and dispose of cases quickly, and deal equally with the defendant in the plea bargaining process, and that to protect the rights of the citizenry of our state, the defendant is not entitled to any specific performance of a plea bargain made and then withdrawn unless that defendant has in fact demonstrated that there has been some detrimental reliance or some prejudice.

If there are no further questions of the Court.

CHIEF JUSTICE BURGER: Very well.

I think our amicus counsel wants to be heard at this time.

ORAL ARGUMENT OF JERROLD J. GANZFRIED, ESQ.,

ON BEHALF OF THE U.S. AS AMICUS CURIAE

MR. GANZFRIED: Thank you, Mr. Chief Justice, and may it please the Court.

In our view, the Court of Appeals incorrectly magnified the respondent's unilateral expectations into a constitutional -- a protected constitutional right. Since the federal courts, of course, have no general

supervisory power over the state courts in criminal cases, the role of this Court in a habeas proceeding is limited to correcting constitutional violations, and it is our submission that such questions arise only when the defendant's reliance on a plea agreement substantially induces his waiver of a right protected by the Constitution.

Ordinarily such an issue will not arise until a defendant pleads guilty, but if the prosecutor breaches his bargain after that, Santobello teaches that a remedy may be appropriate, that the defendant would be entitled to relief, and the reason is that where the bargain is a material inducement to the plea, the knowing and voluntary nature of the plea is called into question.

Now, admittedly, there may be some cases where similar concerns would arise prior to the plea, where the defendant has detrimentally relied on the bargain, for example, by cooperating with ongoing investigation, but the same principle applies here, too. The defendant would be entitled to some kind of relief only because his reliance on the agreement undermines the knowing and voluntary waiver of a protected constitutional right, and that is the privilege against self-incrimination.

QUESTION: In your view of Arkansas law, at

what point could the defendant have withdrawn his participation and said, I have changed my mind, I want to go to trial?

MR. GANZFRIED: Any time.

QUESTION: Any time up to when?

MR. GANZFRIED: As I understand it, certainly any time up through the entry of his plea of guilty, and in fact I think under the current rules in Arkansas he could move to withdraw his plea after the plea had been tendered but before sentence had been passed by the court.

QUESTION: May I ask if your emphasis on detrimental reliance and prejudice means that it is sort of an estoppel theory? The prosecutor becomes estopped if the other party relies?

MR. GANZFRIED: Well, it could be put in those terms. Of course, in the contract law analogy and promissory estoppel, the reliance by the other side, of course, has to be reasonable and justified, and in the context --

QUESTION: And there has to be a right at stake, I guess. There has to be a right at stake. His right to a trial is at stake.

MR. GANZFRIED: Frankly, in terms of the constitutional vocabulary, to move aside from the

contract law, it seems to me that you have to have a question about the knowing and voluntary waiver of a right. That is, have you waived something, and did you do that substantially induced by an agreement? In that event, you may have detrimental reliance, and you may be entitled to pursue a claim.

QUESTION: See, detrimental reliance is not normally an element of waiver. That is merely intelligence and understanding the choices, and when you bring in the reliance, it strikes me that your analogy is really sort of an estoppel analogy.

MR. GANZFRIED: Well, we keep changing tracks in terms of the legal vocabulary used here between the constitutional law analysis and the contract law analysis. I think the analogies are apt in this case, and generally when I use the term "detrimental reliance" it will be to refer to the waiver of a right induced by an agreement, and that raises questions as to the voluntary and knowing nature of that waiver. Now, those concerns --

QUESTION: Is there any doubt that this man did rely on it?

MR. GANZFRIED: There is -- It is absolutely clear that this man did not rely on that?

QUESTION: That he didn't rely on that

agreement?

MR. GANZFRIED: Did not rely on the agreement. The District Court expressly found, the Court of Appeals agreed, he did absolutely nothing in reliance with this --

QUESTION: What did he do to show he didn't rely on it?

MR. GANZFRIED: He did nothing to show that he did rely on it.

QUESTION: Well, I mean, he didn't do anything, did he?

MR. GANZFRIED: He did nothing. He told his lawyer, this sounds like a good deal, let's take it, and his lawyer got back to him and said, it has been withdrawn.

QUESTION: Now, if he had not gotten the deal, would he have done something?

MR. GANZFRIED: If he had not gotten the deal?

QUESTION: Yes, sir.

MR. GANZFRIED: He might have pleaded guilty to -- He might have gone to trial.

QUESTION: He might have gone out to get some witnesses, too.

MR. GANZFRIED: He might have done any number of things, but he did nothing.

QUESTION: I don't see how you assume that when a man gets an agreement with the state, he relies on it, then he has to show in addition that he was injured by it. That is my problem.

MR. GANZFRIED: He would have to show some prejudice, but first he has to show --

QUESTION: What prejudice?

MR. GANZFRIED: Some -- that there was some right that he was entitled to have that he has lost because of the agreement.

QUESTION: Some right? The right is to rely on the state.

MR. GANZFRIED: Not when you have an agreement that is not finalized until a court accepts it. There was no justifiable reliance.

QUESTION: It has been made by a state official authorized to make --

QUESTION: We have no quarrel with that, and frankly we have no quarrel with the proposition that prosecutors ought to keep their word and abide by their bargains, but the point in this case is whether the respondent has a constitutional entitlement to hold the prosecutor to what in effect is a slip of the tongue.

QUESTION: And that depends --

MR. GANZFRIED: In a situation where the

defendant, of course, can back out at any time.

QUESTION: And that depends, as I understand your theory, on his showing that he is worse off than if the representation had never been made. Detrimental reliance. And you say he --

MR. GANZFRIED: We don't have that here. There might be a case where you have some sort of detrimental reliance.

QUESTION: But the minimum showing is some detriment. He has been -- He is worse off than if there had never been this tentative agreement. That is your whole -- what I understand to be your position.

MR. GANZFRIED: That is right. Now, ordinarily, even if he makes that showing --

QUESTION: The same essential ingredient is in any estoppel case.

MR. GANZFRIED: Ordinarily, there is not going to be that showing unless he has a plea, unless he has cooperated with the authorities. Here we have none of those, and none of those concerns. What we have is a rule, a prophylactic rule laid down by the Court of Appeals keyed to the unilateral expectations of the respondent.

Now, it seems to me that it would be the rare criminal defendant who doesn't hope for the best,

whether it be a lenient plea agreement, an acquittal at trial, or a light sentence. The point is that he has no right to impose those transitory hopes, to make those transitory hopes binding on the state and the courts.

This Court has held that a defendant has no right to plea bargain. He has no right to have a guilty plea accepted, and he has no right to know in advance what his sentence will be, a particularly important issue here, because until that plea is presented to the court and the bargain is presented to the court and it is accepted and sentence is passed --

QUESTION: Did I understand you to say that the defendant could have withdrawn his plea at any time or his whatever you want to call it at any time until the judge had accepted it and acted on it?

MR. GANZFRIED: That's correct, and there may even be provision -- I would have to check this -- under Arkansas law similar to under federal law that would allow him to move to vacate the plea thereafter, but that is correct. There was nothing binding on the respondent. He had -- even if he thought he still had an agreement after it was clearly communicated that it had been withdrawn, he could have walked away from it at any time, certainly at any time relevant to these proceedings.

QUESTION: Tc the extent there is any reliance on the contract theory, then the contract theory would be that both are bound or neither is bcund.

MR. GANZFRIED: Well, there is no meeting of the minds, that there has been no performance, not even partial performance, and in fact there is no mutuality of cbligatien, because what the Court cf Appeals has done is to impose an obligation only on the government, the prosecution, tc abide by even what in this case is really a ludicrous slip of the tongue to suggest that there would be a sentence that would give him no additional jail time fcr a murder that he had been previously convicted of.

QUESTION: Mr. Ganzfried, I take it it would make no differences for purposes of your argument if the agreement had been reduced to writing by the parties.

MR. GANZFRIED: That is correct. There would be no justifiable reliance until he waived a right, and then that was done because he was induced by the agreement.

QUESTION: Well, I suppose these written agreements, at least in some jurisdictions, purport to give up those rights on the signing of the agreement, although it still is subject sometimes to approval by the court.

MR. GANZFRIED: Well, certainly in the federal courts, and in Arkansas as well, it is up to the court ultimately to decide whether that plea is acceptable and that bargain is acceptable. Now, under the rule of the Court of Appeals, what prosecutors are going to have to do to protect themselves is that they are going to have to possibly conduct all negotiations on the record, and as a result, they would remove much of the flexibility that now benefits defendants as well as the state.

Another possibility is that plea proposals may be couched with so many contingencies that they are virtually meaningless. Another possibility is that negotiations will be delayed until so late in the process that the benefits of prompt disposition would be lost to prosecutors and defendants, because, after all, in Arkansas and presumably in the Eighth Circuit, the prosecutor is going to be concerned that a slip of the tongue may bind him to something that he never intended to say, and that the other side never took him -- and relied on.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Quiggle.

ORAL ARGUMENT OF RICHARD QUIGGLE, ESQ.,

APPOINTED BY THIS COURT

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

I believe that the facts of this case do not warrant the broad ruling that the state seeks, that even if this Court finds that the Eighth Circuit's holding is broader than the Eighth Circuit perceived it to be, and therefore this Court decides to enter a very broad ruling, it should certainly not be that the state is allowed to play fast and loose with the bargaining process until it decides it has gotten the kind of penalty it wants.

QUESTION: Do you agree with your friend that the defendant may withdraw at any time up to the time the Court acts on the plea and possibly even afterwards?

MR. QUIGGLE: I think that is true, Your Honor. I think that is one of the reasons that strict contract principles in this matter just do not apply. I think the government is held to a higher standard than the defendant might be, but that is not the facts of this case, either, Your Honor. The fact is, and I disagree sharply with the state when they argue that my client did not plead guilty. My client in fact pled guilty to twice as much as the original agreement called for, and I think it is absurd to think that he would not

have pled if he had been allowed to do so to 21 years if he would plead guilty to 42.

QUESTION: Do you mean twice as much in terms of adding the numbers --

MR. QUIGGLE: Yes.

QUESTION: -- without reference to whether they are consecutive or concurrent?

MR. QUIGGLE: That is -- well, in fact, the bargain, Your Honor, that was finally struck was that it would be 21 years consecutive as opposed to 21 years concurrent. I also disagree when the state suggests that that would have resulted in no additional penalty to my client. He had already served under the original murder conviction two and a half years of the original sentence. Plus, even if he got a consecutive sentence -- I mean, a concurrent sentence, it would not have started to run until it was actually entered by the court.

Thus, effectively speaking, there would have been some additional penalty. Obviously, we can only go back and second guess as to whether that would have been adequate or been accepted by the trial court.

QUESTION: You agree, then, that the trial judge was the final arbiter?

MR. QUIGGLE: Absolutely, Your Honor.

QUESTION: Didn't the Eighth Circuit leave your client in a better position by its order than he would have been if the plea agreement had been accepted and the prosecutor had been forced to abide by the agreement? The Court of Appeals opinion says that not only must the prosecutor be deemed to have accepted the agreement, but the trial judge. How can you justify that?

MR. QUIGGLE: I think effectively speaking you are right, Your Honor. The Court cut through the judicial intervention that would have occurred had this case come up in the normal course of things. I believe that the Court of Appeals was simply acting in a very practical fashion. After all, my client had already served the enhanced sentence.

QUESTION: Well, but the Court of Appeals is applying constitutional principles. It has no business tinkering at all with Arkansas procedure unless there is some constitutional violation, and I understood its theory and I thought your theory was that the bargain, the plea agreement is specifically enforceable, but the Court of Appeals did more than specifically enforce the -- it bound the trial judge to the plea agreement in a way that he would never have been bound under the terms of the agreement.

MR. QUIGGLE: I think that's correct.

QUESTION: Do you feel you could justify that in any way?

MR. QUIGGLE: Yes, Your Honor, I think I can, because this case, even the habeas case has been pending a long time, and these facts are very stale, and my client has already served the enhanced agreement. It would simply not be fair to my client to place him in the jeopardy of the trial court now perhaps rejecting that plea bargain.

QUESTION: That has nothing to do with the theory of your case, does it? I mean, it is just kind of throwing yourself on the mercy of the court.

MR. QUIGGLE: Well, I guess it is, in a sense, Your Honor, but of course I will say that this issue was not brought up to the Eighth Circuit, and therefore their opinion does not address it at all, and I am somewhat at a disadvantage to justify their thinking when I don't know that they ever thought it. I believe that --

QUESTION: Do you think they wrote it but they didn't think it?

MR. QUIGGLE: Well, they did not address the issue of whether they can order specific performance and bypass what the trial judge might have done back in

1973, or actually '72, I'm sorry. And therefore I don't know what the rationale that they might -- that the Eighth Circuit might have applied to it would be. I think it is, as I have expressed to you, that they found a constitutional violation, and they attempted to shape a remedy that seemed appropriate under the unique circumstances of this case.

QUESTION: Ordinarily one finds the rationale in the opinion.

MR. QUIGGLE: I agree, Your Honor, but that was not an issue that was addressed by the parties or the Eighth Circuit.

QUESTION: Mr. Quiggle, under Arkansas practice, if the agreement had been -- there had been no misunderstanding and no change, and had been submitted to the court, would there have been a recommendation by the prosecutor that that be entered?

MR. QUIGGLE: Absolutely, Your Honor, and the fact of the matter is, even unto this day trial courts in Arkansas routinely, if not -- and consistently take those recommendations. It is rare that a court rejects one in Arkansas, and that was certainly true back when the plea would have been entered in this case had the government not reneged on its word.

Unfortunately, the trial judge who would have

heard this matter has been dead a number of years, so it would be impossible to go back to him, and the practice has shifted some. We have new rules of criminal procedure, and so forth. But practically speaking, had this gone before the trial judge, every expectation would have been that it would have been approved if a prosecutor recommended it, and that is, of course, a central point to what my position is.

I am certainly not suggesting in the routine course of things that trial judges would be bound by what the prosecutor agrees to recommend. On the contrary, it is simply that the prosecutor has to stick by his word. The trial court can always reject it.

And I don't perceive the Eighth Circuit -- that's why I continue to make the point that I don't think this is a proper case for any kind of broad ruling, because it has got some screwy facts in it, and there is also the aspect of this case that I think makes it difficult -- my position difficult here is that there is ineffectiveness proven in the record, and there is ineffectiveness claimed as to the trial counsel for not going forward to enforce the plea.

He states in the hearing that there was simply nothing he could do. Now, I presume that a deputy prosecuting attorney knows the law, and Santobello had

been decided several months at that point, but those issues were not reached by the Eighth Circuit, so I don't mean to rely on or press it on this Court heavily at this time, but the fact is, there is a lot of uncertainty built into this opinion, I believe, and therefore I don't think it's the kind of a case upon which a broad ruling should depend.

If there is one, I just think it is that the prosecutor cannot make his word in a final sense, as here, where there was an offer that was clear on its face, and I disagree with the state when they say that it is really simple, it is really logical to figure out what happened here. If that is true, why didn't they put on any proof about that? They offered no witnesses at all in this case. None.

The fact is, if one wants to speculate, which is all the state can do, about the prosecutor's motivations, I submit to you that it is equally logical and perhaps a lot more believable that this prosecutor meant exactly what he said when he offered 21 years concurrent, and the supervisor found out about it and overruled him, because the facts of this case, as are clearly seen from the Eighth Circuit's opinion, were shocking, where a father kills his own daughter.

There was lots of press. The Court will

recall there was a mistrial because of the press. After the plea was rejected there were collateral civil lawsuits filed in this matter, and I think the prosecutor was taking a lot of heat, and consequently he said no, we can't -- we are going to have to get more time out of this guy, the deputy prosecutor's superior. And I think under the facts --

QUESTION: When was this told to the defendant?

MR. QUIGGLE: Your Honor, I don't think it was for some months, until after the plea was rejected, because it was set down for a hearing that was continued, and then they came back and had the mistrial that I mentioned just a second ago, and I believe that it was not until they commenced that trial that my client, Mr. Johnson, knew that the original offer had been rejected.

QUESTION: There is nothing in the record about it one way or the other?

MR. QUIGGLE: It is not clear from the record, Your Honor, but I will say that the prosecutor, the deputy prosecutor who was assigned to the case after the plea was withdrawn by the state admitted that he did not contact Mr. Johnson until shortly before the time of the hearing where the mistrial occurred, and so I think

presumably that encompasses the fact that he did not communicate the withdrawn plea.

The facts are very specific about how the original offer was made, and I think that they would have been equally specific had this been communicated.

I think if the Court does consider this matter in the broad sense that the state seeks, that it must give due consideration to the state's argument that the Sixth Amendment does not apply in situations like this, because I think clearly it does apply. I think that, for example, as a trial counsel in a criminal matter, if my client has admitted that he is guilty, and is ready to plead, I believe that that is going to have a profound impact upon that defendant if he then is forced to go to trial.

It is certainly going to have a profound impact on me or any other criminal attorney if I have to put that man on the stand. I think it would be very difficult to do so. I think it places counsel in a very awkward ethical position, because probably he is going to have to take the stand and lie. Therefore, I think that the Court must be very cautious in waving aside the state's argument that -- or my contention that the Sixth Amendment is very important in this case.

The Eighth Circuit and the Fourth Circuit in

the Cooper case certainly thought it was also.

QUESTION: Well, in those circumstances, in terms of the impact, isn't the standard that you cannot assist him if you know he is testifying falsely?

MR. QUIGGLE: I certainly think in the instance where a defendant, as here, would have to take the stand in order to make their case, I believe that it does --

QUESTION: Would it be any different before or after?

MR. QUIGGLE: Well, Your Honor, I presume that before the defendant has not conceded his guilt to anyone, and in the face of these kinds of facts, in fact, the defendant has said, yes, I am guilty.

QUESTION: Are you suggesting that that would be the first time that the defense counsel became aware of the reality?

MR. QUIGGLE: It certainly would probably be the first time under normal practice, I would think, Your Honor, that a defense counsel was told by the defendant literally, I am guilty.

I would just like to say one more thing, and that is that I don't see the Eighth Circuit establishing a prophylatic rule here. I think the Eighth Circuit's decision was tailored only to the facts of this

particular case, and it was very narrowly drawn, and therefore I don't believe that it impinges upon the criminal process in the way that the state perceives, but if it does, it should impinge such that the prosecution must deal honestly and fairly and abide by its word.

Thank you.

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

MR. CLARK: No, no further comments.

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

(Whereupon, at 11:38 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the 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:

#83-328 JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION, Petitioner
v. GEORGE JOHNSON

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

BY Sharon L. Connelly

(REPORTER)