OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1198

TITLE TEXAS, Petitioner V. SANFORD JAMES McCULLOUGH

PLACE Washington, D. C.

DATE December 10, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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TEXAS, :

Petitioner :

v. : No. 94-1198

SANFORD JAMES McCULLOUGH :

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Washington, D.C.

Tuesday, December 10, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 o'clock a.m.

APPEARANCES:

RANDALL L. SHERROD, ESQ., Criminal District Attorney of Randall County, Texas; on behalf of the Petitioner.

JEFF BLACKBURN, ESQ., Amarillo, Texas, pro hac vice, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:10 a.m.)

THE CHIEF JUSTICE: Mr. Sherrod, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF RANDALL L. SHERROD, ESQ.

ON BEHALF OF THE PETITIONER

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

At the outset I would like to go over a couple of facts that I think is necessary in the analysis of this important case.

First of all, Texas has a bifurcated trial system. Prior to a trial a defendant has a right to elect whether a judge or a jury will assess punishment in a given case.

The respondent at his first trial in this case was tried by a jury and found guilty of murder, having previously filed an election to have a jury assess punishment. The jury assessed punishment at 20 years' confinement.

Respondent filed a motion for a new trial with the same trial judge. The motion was granted by that judge. A second jury again found the respondent guilty of murder.

Prior to the trial a motion had been filed,

this time alleging that the judge should be the one that would assess punishment, and of course we think that is very significant. The same judge at the second trial assessed 50 years' confinement, and at the behest of the defendant in this particular case the trial judge also entered specific findings of fact on why the 50 years' sentence was given by the court at the second trial.

Of course, I think from looking at the specific facts that we are discussing in this case, there's two rather general questions that need to be answered by the Court.

The first question is, does the due process clause of the Fourteenth Amendment require the presumption of vindictiveness enacted in North Carolina versus Pearce upon retrial of a criminal case, or do any of the following three areas that I would like to discuss render the reasonable likelihood of vindictiveness, as the Court has said, de minimis.

First of all, I think that the most important and the strongest allegation that the state has is the very fact that the defendant in this particular kind of case, pursuant to Texas law, has the absolute right to determine which sentencing authority will have the power to assess the punishment at the second trial.

I think that's extremely important. When

you're discussing that particular element of the question, I think it's important to recall Pearce and understand and Pearce basically stands for the proposition that punishment assessed upon retrial of a criminal case should not be set in a certain amount because of vindictiveness of the sentencing authority toward a defendant for exercising his right to appeal.

Vindictiveness, as the Court has said, should have no place in setting punishment upon retrial. A presumption of vindictiveness in Pearce was established because of the possible chilling effect a retaliatory motive could have upon a defendant's exercise of his legal right to appeal.

The presumption of vindictiveness is not required solely because of the possibility of a greater sentence that may possibly be assessed upon retrial. Neither does the possibility of vindictiveness alone require a presumption of vindictiveness.

The presumption of vindictiveness has been held to apply only where there is a reasonable likelihood of vindictiveness, and I think when the Court looks at Colton, Caffin, Bordenkercher and Goodwin, that that's the interpretation that would now stand concerning the Pearce presumption of vindictiveness.

The presumption of vindictiveness was enacted

by this court to protect against the chilling effect of retaliatory motivation in assessing punishment when a defendant has basically exercised his right to appeal, not the fact that vindictiveness may occur, but for the retaliatory vindictiveness that may occur by a trial judge at a second trial.

When we look at the most common application of Pearce, I think the validity is still there. You take a situation where a defendant is tried the first time and a trial judge assesses punishment, and you take the fact that he exercises his right of appeal and that he receives a second trial.

When you consider the fact that if the judge assesses punishment greater than what he assessed at the first trial, there's only two reasonable reasons that the Court should consider motivated that increase in sentence.

Of course, the first one is obviously that he was retaliating against the defendant for exercising his right of appeal. The second option may be that the second trial has brought to light additional evidence that may in fact justify an increase in the punishment.

Now, the rationale in Pearce and those particular cases is still very valid, and there's a reason for it and it still applies, and that reason is

that if in fact there was no retaliatory motive, it's not too difficult for the Court to place a list of those reasons upon the record.

So, under those facts --

QUESTION: But on these facts, don't we have to cut back on Pearce somewhat if this judgment is to be reversed?

MR. SHERROD: I think you do, sir, yes. Specifically in a case like this when the defendant has the option of filing at the second point, the only reason for filing to the judge in the second point, rather than the fact that he may be trying to exercise or protect one of his constitutional rights, I submit to you is more that he is trying to seek a windfall.

He is trying to limit the second court from considering evidence or exercising its discretion for the first time in what may in fact be a fair sentence. Now, when you analyze this very closely, what you see is that the application of Pearce in states like Texas actually results in a chilling effect upon a defendant to go to a jury to have that jury determine punishment.

QUESTION: Did not Pearce leave open the possibility of an increased sentence based on new information?

MR. SHERROD: Yes, sir. I believe under

Wasman that it basically has, and also under interpretations given strictly under Pearce because there is two provisions in there that rather conflict.

I believe Wasman indicates that that has in fact occurred, and that's the second issue that the Court can consider in this particular case, and of course that would be whether there was sufficient evidence presented on the record that would justify an increase in sentence based upon Wasman and its interpretation of the Pearce doctrine.

The second area that I think very important --

QUESTION: Of course, in Pearce, Justice Stewart spoke of events happening after.

MR. SHERROD: Yes, sir.

QUESTION: These events, I suppose you concede, all took place before?

MR. SHERROD: Every one of the facts that would justify an increase in sentence did in fact occur prior to the first trial, but I think what's important in this case, and the information that contains in Wasman, and where we need further definition and a little guidance, is whether or not the increase in the word from "conduct" to "events" that was established in Wasman indicates that it's events that come to light at the second trial.

I think when you look at the rationale in the protections that Pearce is meant to apply to, you see that there is no reason that the Court or the sentencing authority at the second trial should be automatically limited from assessing what they feel is a fair punishment, and when you look at the application of Pearce, and the application that the State of Texas -- that has resulted in their literal application of Pearce, you see situations like this where the court of appeals judge says that it's rather unfair that there is no evidence of vindictiveness in this case.

Yet, because we must follow the application of North Carolina versus Pearce and the literal interpretation of that, that when a judge assesses the punishment at the second trial that under those facts there is a limit upon the sentence, that it can result in unjust sentencing.

QUESTION: Then, you think that North Carolinia against Pearce went too far?

MR. SHERROD: Yes, sir.

QUESTION: In its holding?

MR. SHERROD: Yes, sir, and I believe for two reasons, and we have alleged three. Of course, the first one is the fact that the defendant has the option of electing who sets punishment.

It seems rather unusual that --

QUESTION: May I interrupt you just there for a moment, please, with a question.

MR. SHERROD: Yes, sir.

QUESTION: If there were no new information brought out at the second trial, the only thing that was different was the defendant said, well, this time I'll have the judge fix the sentence, would the judge then in your view have been free to impose a higher sentence?

MR. SHERROD: Under our argument, yes, sir. Because our position would be, Your Honor, that there is no reasonable likelihood of vindictiveness in this particular situation, again, when the defendant has the option of electing which sentencing authority shall assess the punishment, and also the very fact that in this case a jury assessed punishment for the first time.

The judge for the first time exercised its discretion in sentencing the defendant at the second trial.

QUESTION: What if the judge just said, "Well, if I'd been the sentencing authority the first time," as I believe she did, she said, "I would have imposed more than 20 years. Now I have a chance to do it so I'll do it."

You would say that would be perfectly proper?

MR. SHERROD: Yes, sir, and I think you can see from the outcome, that was our position because we did not ask the judge and the judge on its own motion did not file the findings of fact. That was done at the request of the defendant.

It was our position at the outset that that did not need to be done under the specific instances that were available under this case.

QUESTION: Is it your view that reading Pearce and Wasman together, the sentencing judge may take into account intervening information which was not available at the time?

MR. SHERROD: Reading your interpretation, yes, sir. Reading the dissents in that case, I think there is a question about whether the conduct that the Court spoke of in that particular case was the conduct of a defendant in pleading guilty.

In other words, I think some members of this Court feel that the very fact that the defendant pled guilty in Wasman had an effect. And so, I still think there's a question about the actual interpretation of what an event means.

QUESTION: But you do have to disapprove or not follow certain dicta in Pearce to reach the result you want, don't you?

MR. SHERROD: Yes, certain dicta of Pearce, yes, sir. I believe that's correct.

When you read the actual opinion that came down in Pearce and when you analyze the interest -- and really, I think what you've got is this. When you look at the cases that have come down, in the four cases I previously discussed, I think what you find is that the Court now is really saying, the mere possibility of an increase in sentence or the mere possibility of vindictiveness is not in and of itself sufficient reason for the Pearce application.

In other words, is there a reasonable likelihood that vindictiveness will occur, and that is what the Pearce doctrine should still stand for today, and I think the extension in the application by the Texas courts has limited a very important element that we have, and by a strict adoption of the North Carolina versus Pearce presumption of vindictiveness, what they do is disallow this very, very important fairness doctrine to both the state with a legitimate concern in exercising discretion in punishment, and also from the defendant, to have his particular case modified to the individual facts of that case and also to the particular defendant, his background and everything that's brought out in that particular case.

So, I believe it has a great effect. Again, when you look at the analysis on it, if there's any chilling effect like the Court talked about in United States versus Jackson, the chilling effect comes from the application of North Carolina versus Pearce.

Any defendant in the State of Texas will be chilled to exercise this option, to have a jury assess his punishment. The reason is because he cannot risk the possibility of going to a jury and receiving a greater amount of punishment under the doctrine established in Chaffen, and if there's any chill to a defendant's rights it's the chill that arises from the application of North Carolina versus Pearce and the presumption of vindictiveness.

QUESTION: Let me interrupt there. It seems to me that you have argued -- it seems to me that defendant would always be exposed to the risk of increased punishment because the jury would be a different sentencing authority from the first jury, and under your view the judge is a different sentencing authority from the first jury, so neither of them would be limited by the sentence.

So, if your argument is correct, really, it's open season on the new sentence?

MR. SHERROD: It is, Your Honor, and the

reason my argument should stand is because, first of all, to modify or to adopt North Carolina versus Pearce has a chilling effect. You cause a defendant to elect to go to a judge that he feels may be vindictive.

You cause him, because of Chaffin, to file to go to a judge. It's a Catch-22. That's what it amounts to, because if there is any -- if there is any chilling effect -- you do away with the chilling effect, the State of Texas does, by statute.

It says, if you are in fear that this judge will be vindictive in assessing the second punishment, then you have the power to elect to go to a jury. But he's not going to go to a jury. He can't run that risk under Chaffin versus Stynchcombe.

And, what I'm saying is that if you free that up for both the trial court and also for the jury to assess whatever they feel is a reasonable punishment, at the first instance when they have an opportunity to exercise their discretion, that that is more fair than the situation we have through the actual application of North Carolina versus Pearce.

The other point that we have in this case is the fact that the judge in this case actually was the court that granted the retrial. Now, I don't feel that that's as important as the first two areas. I feel that

the first two areas are the ones that have more constitutional significance.

One thing that I think is extremely important, depending on which one of these theories the Court may decide, may have a much greater effect on the nation as a whole, limited strictly to the fact that the option and the election lying with the defendant should control and should say that because of that fact, North Carolina versus Pearce, the arguments will be restricted purely to the State of Texas and states that allow the defendant that particular right.

But, if the Court goes under the second theory that we have proposed, and that is that there should be no restriction when a sentencing authority exercises its discretion at the punishment stage for the very first time, it will affect also the federal courts.

I think the argument is valid in each of those areas. I don't believe the Court has ever written upon the effect that retrial would have, and the granting of retrial, by the trial judge that in fact sets punishment the second time, and I don't believe the Court has ever ruled on this particular authorization.

Even though in North Carolina versus Pearce the same judge was involved, that issue was never raised before this Court, and I think it's extremely important

to balance the legitimate interest that the state and the defendant have in wide discretion in the sentencing authority, and that must be balanced with the reasonable likelihood of vindictiveness that may occur.

In summation, under any of these arguments, I don't believe it is necessary for the presumption of vindictiveness to be applied like the courts in Texas have done, and again, those courts are talking about following North Carolina versus Pearce literally.

Thank you.

QUESTION: May I ask you this question before you sit down.

MR. SHERROD: Yes, sir.

QUESTION: Does the record show why the new evidence was not discovered and used at the first trial?

MR. SHERROD: I don't believe the record does. I tried that case so I know why it wasn't, but --

QUESTION: Well, if it's not in the record I suppose you'd better not --

MR. SHERROD: No, sir, it was not.

QUESTION: The other ground was remorse. That was in the first trial and the second trial, I guess.

MR. SHERROD: No remorse, yes, sir, and I don't think that distinction is really that critical because --

QUESTION: I am not too sure it is a ground for increasing somebody's sentence.

MR. SHERROD: Sir, I don't think that fact just in and of itself --

QUESTION: The judge did use it for that purpose.

MR. SHERROD: She did use that, but I'm saying this, I think under the circumstances that perhaps would be a valid reason for the Court to assess the punishment the first time but not to increase it.

QUESTION: So, since she didn't have the right to do it the first time, all she had to do was grant a new trial?

MR. SHERROD: I don't follow that question, sir. I'm sorry.

QUESTION: I wonder if this is -- would it have been permissible for the trial judge to grant a new trial because she was convinced the sentence was wholly inadequate?

MR. SHERROD: Yes, sir.

QUESTION: And if she really thought that they ought to try it over and impose a proper sentence?

MR. SHERROD: Yes, sir. And the reason for that is very obvious. Should we limit a judge, when that judge can in fact consider that evidence, or is

there a reasonable likelihood that the sentence at the seconid trial was caused because of vindictiveness.

And, that's where we're urging the Court to say no, that there is no necessity for the presumption that occurs. You must remember that the defendant may always -- the defendant always has the right under North Carolina versus Pearce to come forward and show that there was actual vindictiveness in assessing a punishment.

So, the protection is there for actual vindictiveness. It's whether or not we would need the presumption of vindictiveness.

Thank you.

THE CHIEF JUSTICE: Mr. Blackburn.

ORAL ARGUMENT OF JEFF BLACKBURN, ESQ.

ON BEHALF OF RESPONDENT

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

I'd first like to address some of the issues raised by the question as to whether the presumption established by Pearce should apply to the peculiar facts of this case. The petitioner in this case has raised first and foremost the issue concerning the election that defendants can make in our state as to whether jury or judge may assess punishment.

First, I would like to note that we argue, and quite forcefully, that this Court absolutely cannot consider this issue. Our state court, the court of criminal appeals, has already made a binding decision as to a matter of state law by way of construing the statute created by our Legislature, Article 3707, and in that construction has told the court that our Legislature has made a determination that defendant should be able to make the choice to elect between judge or jury for sentencing, free of any vindictiveness.

In our interpretation, that is a conclusive determination, a construction of a state statute, and because of that, this Court will be bound by it. If the merits of the argument can be considered anyway, several things need to be noted.

I think that to really understand our position on this question of jury election it is important to look at the decisions a trial lawyer in Texas who is defending a criminal defendant has to make. Because of the operation of the rules of evidence, trial lawyers have to make certain decisions as to which sentencing body they decide to elect on behalf of their clients.

If a defendant elects to be punished by a jury, it means that he is going to be bound by certain rules of evidence, as to what he can put in evidence.

For example, a jury can only consider certain things in the State of Texas because only certain items of evidence are admissible before, the prior criminal record of the defendant --

QUESTION: Is there a separate sentencing hearing when you have a sentence by a jury in Texas?

MR. BLACKBURN: Yes, Justice Rehnquist. There is a -- we have a bifurcated trial system. Regardless whether you elect judge or jury, there is always going to be a separate sentencing hearing.

QUESTION: And what you are talking about now is the sort of evidence that is allowed to go before the jury in the sentencing hearing?

MR. BLACKBURN: Yes, that's correct, Your Honor. If a defendant elects to go before the jury in a sentencing hearing, he can put on evidence, or the state can present evidence of his prior criminal record, his reputation in the community, and the jury can consider the facts offered.

Under our rules of evidence, that's all the jury can consider. If he elects to go in front of the judge and have the judge assess punishment, he can put on a great deal more information.

For example, we have a system whereby defendants can have a pre-sentence investigation

conducted, very similar to the federal system. That can be considered by the judge. Opinion testimony about the nature and character of the defendant can be considered by the judge.

None of these things can be brought forward under the rules of evidence if a defendant elects to go in front of the jury. So, you see, the choice as to be made based on the facts and circumstances of each particular case. It's a difficult decision for every defendant in Texas to make.

The problem with the argument advanced by the petitioner is that they would create a new consideration for defendants, and that consideration would be whether the judge would possibly be motivated by feelings of retaliation and vindictiveness. If this argument is accepted, vindictiveness is going to become a factor in making the decision as to whether judge or jury should be selected to assess punishment.

Now, the import of North Carolina versus Pearce, according to our reading of that decision, is that vindictiveness should play absolutely no role whatsoever in the criminal trial process. Pearce sought to abolish vindictiveness completely and absolutely.

This argument begins to resurrect te spectre of vindictiveness. It begins to make vindictiveness

play a certain role in the whole process of criminal trials.

Because of that, it should be rejected as a procedural distinction that somehow removes a Texas case from the ambit of North Carolina versus Pearce.

QUESTION: What would be your position if a different judge had tried the second case and entered the same sentence as was imposed here?

MR. BLACKBURN: I don't think that would make a difference under the facts of this case, Your Honor. I don't think the actual person of the sentencing judge would have any role in whether the sentence could be --

QUESTION: Wouldn't the vindictiveness of a brand-new judge come into the picture?

MR. BLACKBURN: Judge, I'm basing my analysis on the approach created by the cases construing North Carolina versus Pearce. Pearce, as I recall -- there was a different judge involved.

It's not so much the individual judge. It's, rather, some of the institutional biases that a judge in that particular institutional position can develop.

QUESTION: But the court didn't -- in Pearce didn't even mention in its opinion the fact that there was a different judge, did it?

MR. BLACKBURN: No, I don't believe so, Your

Honor. I think that was noted in subsequent cases, Hardwick versus Doolittle and certain others, that the actual sentencing judge was different.

QUESTION: In the courts' opinions in those cases, was that noted?

MR. BLACKBURN: I believe it was, in Hardwick versus Doolittle, but I'm not certain about that, Your Honor.

QUESTION: Mr. Blackburn.

MR. BLACKBURN: Yes, sir.

QUESTION: Would your position be the same if the defendant had elected again to be tried by -- again to be sentenced by a jury?

MR. BLACKBURN: No, Your Honor. I think that if he had elected on the second trial to be sentenced by the jury, the jury, assuming that they had no knowledge of the prior sentence, could have given him whatever they felt was just and proper under the circumsances. I don't think there would have been any limitation.

QUESTION: -- to prove that each juror had no knowledge of the prior sentence?

MR. BLACKBURN: I think that would be the burden of the defendant in that particular case, Your Honor.

QUESTION: But if the results of the first

trial were reported in the press, that would be a rather difficult burden to carry, wouldn't it?

MR. BLACKBURN: That's true. I think it would be very difficult for defendants to prove that.

QUESTION: Even if one juror said, "Yes, I read the story in the press," and that juror were permitted to sit, you would say they had vindictiveness on the second go-round?

MR. BLACKBURN: No, Justice Powell. I think that it would be very difficult, and it would take a great deal more facts, to show vindictiveness on the part of a jury in that kind of a situation.

I think if a defendant elects to have a jury assess punishment on the second trial, the likelihood of vindictiveness truly is de minimis, and under those circumstances, and given the Court's reasoning in Chaffin, the Pearce rule would not be engaged and the presumption would not apply.

The second question that the State has raised is the idea that because the judge granted a new trial on motion of the defendant, and that because of the procedural situation of the case involving as it did a motion for new trial rather than a direct appeal to a higher tribunal, the argument goes that this so far removes this case from the ambit of Pearce that the

presumption of vindictiveness should not be engaged.

There is no functional difference between a defendant who is alleging error on the part of the trial judge and seeking a new trial through the device of a motion for new trial in Texas. There is no functional difference between the defendant in that circumstance and a defendant who is filing a direct appeal alleging error on the part of a trial judge.

We would urge that this Court adopt the reasoning set forth by the Eleventh Circuit Court of Appeals in United States versus Monaco in which that Court held that because a defendant had the right to exercise the right to move for a new trial without fear of vindictiveness, the mere fact of filing a motion for new trial or gaining retrial upon a motion for a new trial is a distinction without difference. We would urge the Court to adopt the reasoning of the Eleventh Circuit on that matter.

The other distinguishing factor that the State has posited in their briefs is that because a jury imposed the first sentence here and the judge imposed the second, the judge had no personal stake in the outcome of the proceedings. Consequently the realistic likelihood of vindictiveness, if any, would be de minimis.

We would just point out in response to that argument that the judge has certainly the same personal and institutional stake in the sanctity of his decision and in the outcome of the case that he would in any other circumstance. We don't believe that to be a sufficient distinguishing factor to bring this case outside the ambit of Pearce.

QUESTION: What was the name of the Eleventh Circuit case?

MR. BLACKBURN: U.S. versus Monaco.

QUESTION: Monaco?

MR. BLACKBURN: Yes, sir.

QUESTION: M-o-n-a-c-o?

MR. BLACKBURN: Yes, sir.

QUESTION: Thank you.

MR. BLACKBURN: The second major problem created by this case is the sufficiency of the trial court's findings and whether or not those findings were -- and should be used to increase the sentence in this case.

Not only were all of these findings related on evidence that was new and did not occur or develop in between the trials, but the record is very important and should be analyzed in this case. Not a single one of the findings relied on by the trial court involved

evidence that had come out the first time at the second trial.

All of that evidence had been presented in one fashion or another at the first trial and a reading of the record bears that assertion out. Every bit of it had come out in one form or another at the first trial.

This is not a case where new information has come to light, even at the second trial. This is not even a case where the facts would fit in within the approach advocated by Mr. Justice White in his concurring opinion in Pearce.

That approach, if I'm not mistaken, was that the trial judge should be able to rely on any new, objective data concerning the defendant. This was not new data.

Furthermore, the other findings made by the court are not even objective in nature. First of all, there's the problem of no remorse shown by the defendant. Certainly that cannot be considered as an objective finding.

Secondly, there is a finding that the defendant never exhibited a desire to rehabilitate himself, and that was not proven. Certainly that cannot be considered as an objective finding.

In conclusion, then, on that matter, the

findings entered by the trial court here were utterly insufficient to justify a sentence increase. First of all, they were not new data. Second of all, they were not objective information of the sort contemplated even by some of the views expressed in the Wasman case.

Because of this, this case does not present an issue of temporal limitation in the application of the Pearce doctrine. This is not new information. This case does not present a question of whether or not the court should be allowed -- or the trial court should be allowed to consider information that is brought out upon a retrial, because all of this information --

QUESTION: That's not -- the position you are now espousing was not the position taken by the court of criminal appeals, was it?

MR. BLACKBURN: No, sir. The position taken by the court of criminal appeals, incidentally, on this matter, on the sufficiency of findings, was that the state had abandoned this claim before them. This claim was never even placed before the court of criminal appeals.

Incidentally, we urge that as a further reason for the Court not to consider this issue now as it is being raised by the state. The decision of the court of criminal appeals, in their opinion, expressly pointed

out that the state had never contended in that court that these findings were ever sufficient to justify the sentence increase. Instead, they relied on the arguments that we had discussed previously.

The problem with this case is that it does not present squarely before the Court the issue of temporal limitation, because all of the facts that were relied on here by the judge, insofar as there were ever objective facts, were not new facts. They were all facts that had been produced at the first trial.

There is not a single finding in this record that could reasonably be construed as being new information that had only come to light at the second trial.

Because of that, we feel that this case does not present the issue of temporal limitation, and that this case should not be used -- that this case should not be considered as one that presents that issue squarely before the Court because it just simply doesn't.

QUESTION: Now, let me call your attention, counsel, to Justice Countis's opinion on the motion for re-hearing, which I have as pages A-8 and A-9 in the Petition for Writ of Certiorari, and if you would take a look at the penultimate paragraph of the opinion, it seems to me you can say that in the rehearing opinion,

they did treat the issue that you were just talking about.

MR. BLACKBURN: That's correct, Judge, but that was in the court of appeals decision. That's an intermediate appellate court in our state.

QUESTION: I see. So, there's a difference between the court of appeals and the court of criminal appeals?

MR. BLACKBURN: Yes, Justice Rehnquist. The court of criminal appeals is the ultimate court of last resort in criminal cases in our state, and in that court's opinion it was noted that the state had abandoned the claim that these findings were sufficient to justify the sentence increase.

THE CHIEF JUSTICE: Do you have anything further, Mr. Sherrod?

MR. SHERROD: Yes, Your Honor.

ORAL ARGUMENT OF RANDALL L. SHERROD, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MR. SHERROD: Very briefly, I'd like to address the problem of whether or not this issue is squarely before the Court concerning the allegations that may be raised in Wasman.

I believe if you will notice in the record that on May the 3rd, 1983, the state's original petition

for discretionary review was filed in the court of criminal appeals, which is the court of last resort in the State of Texas. You will also notice that that petition was denied and discretionary review on the court's own motion, on a very limited area, was granted.

It would be our position that the denial of the original petition for discretionary review that had been filed by the court and did in fact include those issues -- and the other thing that it is important to remember is, Wasman did not come down until after we had filed our state's original petition for discretionary review.

QUESTION: Well, you say "the other thing." What is the thing that isn't the other thing?

You were saying, your petition for review to the court of criminal appeals was denied. What follows from that?

MR. SHERROD: Well, when it was denied, of course, the court on its own motion granted discretionary review to consider whether the court had the --

QUESTION: Performance?

MR. SHERROD: Yes, performance. That was the only issue that was raised. So, I feel that the fact that they denied our original petition for discretionary

review, in fact, was a ruling that would allow us to bring that issue to this Court.

QUESTION: So, the court of criminal appeals never wrote any opinion in the case except the one about saying that the court of appeals didn't have the power to reform the sentence?

MR. SHERROD: Yes, sir, and that was because they granted discretionary review on the court's own motion only to that limited effect. The Court will also notice that the state did file a second motion for re-hearing and that we raised the Pearce application but we did not raise the subsequent events and findings of fact that were filed.

But, it would be our position, Your Honor, that it is raised for review and in this Court, because it was raised in the state's original petition for discretionary review that had been denied.

I believe that's all.

THE CHIEF JUSTICE: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:42 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#84-1198 - TEXAS, Petitioner V. SANFORD JAMES McCULLOUGH

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

BY Paul A. Richardson

(REPORTER)