OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ALABAMA, Petitioner V. JAMES LEWIS SMITH

CASE NO: 88-333

PLACE: WASHINGTON, D.C.

DATE: April 24, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

ALABAMA,

Petitioner

v. : No. 88-333

JAMES LEWIS SMITH

Washington, D.C.

Monday, April 24, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:34 o'clock a.m.

APPEARANCES:

P. DAVID BJURBERG, ESQ., Assistant Attorney General, Montgomery, Alabama; on behalf of the Petitioner.

PAUL J. LARKIN, JR., Assistant to the Soliciter General, Department of Justice, Washington, D.C.; amicus curiae, supporting the Petitioner.

DELORES R. BOYD, Montgomery, Alabama, appointed by this Court; on behalf of the Respondent.

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P R O C E E D I N G S

(11:34 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 88-333, Alabama against James Lewis Smith.

ORAL ARGUMENT OF P. DAVID BJURBERG

ON BEHALF OF THE PETITIONER

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

In North Carolina v. Pearce, this Court established a prophylactic rule, a presumption of vindictiveness to correct due process violations by courts that sentenced a defendant to more than -- more time after a successful appeal.

The evil sought to be corrected was retaliation in success -- for successfully appealing. In this case, Smith, that is, the Respondent, appealed his guilty plea, and, upon retrial, his sentence on the burglary charge was enhanced from 30 years to life. He was also sentenced to life on a reinstated sodomy charge and given 150 years on the rape conviction to run consecutively to the other charges.

Later cases by this Court has established that the Pearce presumption only applies to situations in which a realistic likelihood of vindictiveness exists

because of the severity of the presumption, which may operate in the absence of proof of improper motive, and, thereby, block a legitimate state response to criminal conduct.

QUESTION: Let me get one thing straight in my mind, Mr. Bjurberg.

MR. BJURBERG: Yes.

QUESTION: The original appeal to the Alabama, it was the Court of Criminal Appeals in this case, was on the basis that the guilty plea had not been knowingly made?

MR. BJURBERG: The narrow basis was that the Defendant was not told the correct minimum and maximum possible range of sentences under our habitual felony offender statute and an enhancement statute when a weapon or dangerous instrument is used. It was not based on a violation of Boykin.

QUESTION: So, he -- he appealed his sentence on the guilty plea and the Alabama Court of Criminal Appeals upheld his appeal, and, what, sent it back for resentencing without that guilty plea?

MR. BJURBERG: They, the Alabama Court of Criminal Appeals sent back for a retrial.

QUESTION: Re -- sure, for a trial --

MR. BJURBERG: Right.

QUESTION: -- rather than a plea.

MR. BJURBERG: Yes. What the Petitioner, the state of Alabama, is asking this Court to consider in this particular case is, in a retrial after a guilty plea, that since there are other readily apparent explanations for the increased -- increased sentence on the retrial, that there is no need for the evidentiary aid, namely, the presumption that Pearce created..

QUESTION: So it's not important that there was a plea bargain in this case? That's --

MR. BJURBERG: It is important that there was a plea. That's the underlying premise, I guess --

QUESTION: No, a plea bargain.

MR. BJURBERG: I'm sorry, the -- yeah, there was a plea bargain.

QUESTION: Is that relevant to your case or is your case the same as if there had just been a guilty plea?

MR. BJURBERG: It's important that there was a plea bargain in our case, because, in the plea bargain, the prosecutor and the court are oftentimes, or always, almost, engaging in exchange for that plea bargain, either sentencing concessions or charge concessions, as in this case,

So the fact that there is a plea bargain, I

think, is very important, in that it throws this case into the U.S. v. Brady and the Santobello line of cases, where it's acceptable to, in exchange for a guilty plea, to offer sentencing concessions and to -- charge concessions.

QUESTION: Well, how often are there guilty pleas entered without a plea bargain? Isn't that characteristic of guilty pleas?

MR. BJURBERG: I would say the very vast majority are entered with a plea bargain, yes, sir.

QUESTION: So I'm not quite sure why that makes the case different from just any guilty plea. If there had been no plea bargain, you would not be making the arguments you're making today?

Because I thought the base of your argument was that the judge became aware of additional facts at the trial that changed his mind on the appropriate sentence. Couldn't that happen without plea --

MR. BJURBERG: But the basis really is that the, the resulting increase in the sentence after the trial is based on this guilty plea because of the lack of information established at the, factual information established at the guilty plea.

QUESTION: Was there any factual information that the prosecutor obtained that he didn't have at the

time of the guilty plea? I know the judge didn't have as much knowledge of the facts until this trial. Is there any indication that the prosecutor discovered anything that he could not have advised the court about at the time the original sentence was imposed?

MR. BJURBERG: Not in this record, no, sir, no.

QUESTION: So I suppose that your -- the rule you would -- you would argue for is one that, as long as the prosecutor doesn't tell the judge everything that might come out of the trial and the defendant sets aside the guilty plea by -- it's unconstitutional grounds or whatever it might be, there could always be an increase in sentence if the judge thinks it's appropriate?

MR. BJURBERG: The focus of our case really is not the knowledge or the lack of knowledge of the facts that the prosecutor might have, but --

QUESTION: But what the judge has.

MR. BJURBERG: But what the judge has --

QUESTION: And I'm suggesting to you that, under your rule, if I understand you correctly, if the prosecutor just withholds from the judge -- not purposely, but just doesn't tell the judge all of the facts that might come out at the trial -- then the judge learns something extra about the defendant's behavior at the trial, the judge could always enhance the sentence.

MR. BJURBERG: The judge will always be, in our position, in our situation, in -- have knowledge of more facts in a trial situation.

QUESTION: Right. And therefore could always enhance the sentence.

MR. BJURBERG: Yes. yes. And that's one of the bases, the basic -- well, what I've characterized as the readily apparent other reasons other than vindictiveness, which is the, the heart of Pearce.

QUESTION: But he could, he could always overcome whatever would be left of the presumption of vindictiveness in every case.

MR. BJURBERG: Well, the rule we're arguing for is that --

QUESTION: But there's a guilty plea followed by a trial at which you learn something more.

MR. BJURBERG: Yes.

QUESTION: How is this case different from Pearce?

MR. BJURBERG: This case essentially is different from Pearce in that, in Pearce, there was an initial trial and an appeal and then a subsequent trial.

QUESTION: That, that wasn't true as to the co-respondent in Pearce, Rice.

MR. BJURBERG: Rice pleaded guilty, correct.

QUESTION: In Pearce, we held a vindictiveness rule applied. So aren't you asking us to overrule Pearce in part?

MR. BJURBERG: No, we're not asking --

QUESTION: How do you distinguish this case from the position of the respondent, Rice, in Pearce?

MR. BJURBERG: The narrow focus of this Court in Rice was on whether or not a defendant under due process was entitled to credit for time served. In -- in -- in -- as Rice came through the system, Rice was not given credit for his time served. And the narrow focus, really, in Rice, is, he's -- he's constitutionally entitled to that time. The other aspect --

QUESTION: I'm not sure I understand it.

QUESTION: Well, that, that, that's, that's not, that's not, was the basis of our disposition. We quoted what Judge Johnson had said, that the state of Alabama offered no evidence attempting to justify the increase and that he found it shocking. And we agreed with that conclusion. And I -- I don't see how your case is really -- can be decided in your favor without overruling Pearce, the Rice portion of Pearce.

MR BJURBERG: Right. Part of what was not in Rice that -- that we feel is in our particular case is

the influence of the -- the plea bargaining that -- that was not sanctioned by this Court until U.S. v. Brady, which was subsequent to Pearce. So that it's that aspect of the plea bargaining that becomes important and which distinguishes, or -- or which allows this Court to rule our way without overruling Rice.

The other readily apparent fact that the reason for the increased sentence is not as a result of vindictiveness is that, in the guilty pleas context -- the Judge -- and prosecutor, but primarily the judge since we're discussing sentencers -- is -- is extending leniency in exchange for that guilty plea.

Ands this Court in U.S. v. -- in its previous decisions, has held that the state is entitled to extend leniency or sentencing concessions to those who do -- who plead guilty. That was in Corbitt v. New Jersey. And that is the other, readily apparent explanation for the increased sentence at the subsequent trial, retrial. So the fact --

QUESTION: But that's also an explanation that would be presant in every guilty plea case.

BJURBERG: Yes. The other readily apparent explanation other than vindictiveness, which I've pointed to in our brief, is that the -- after, at the trial, or the, the retrial of the case, the court, then,

is much more aware of the defendant's mental and moral attitudes concerning his own -- rehabilitation and attitudes in the case.

And this is illustrated by the facts in this particular case. The Judge stated that his decision in increasing the sentence on the retrial was partly -- partially based on the defendant's outlook on it, I assume, meaning the -- the case, the Defendant's position during trial and "what you said at it," meaning the trial, an apparent reference to the, what the Judge considered to be the Defendant's perjury

So that, that, this explanation also is readily apparent on the retrial of any -- of a case. And this is a sufficient explanation for the enhanced sentence versus a presumption that the enhanced sentence is, in fact, a -- the product of vindictiveness. As Mr. Justice --

QUESTION: Now, the, the Respondent tells us that there is some evidence of actual vindictiveness here. Would that question, even if you were, even if we were to agree with you, be open on remand to resolve?

MR. BJURBERG: I believe it would be, that the -- the Alabama Supreme Court could then engage in -- in, or remand it to the Court of Criminal Appeals for them to determine whether or not there is evidence of actual

vindictiveness.

And I think that's another aspect of this case, that's not before this Court, the -- part of the Pearce was protecting the defendant from the fear or the apprehension of -- of vindictive sentence. But that is not present in this case, because, obviously, the Defendant was not afraid of -- of appealing.

And in fact, in -- I think it was -- well, I don't have -- Michigan v. Payne, this Court made the same type of statement that the -- so, the only issue, really, before this Court, then, would be the issue of vindictiveness, not the apprehension of the vindictiveness.

I believe that the facts of this case fully support or illustrate the -- the points that I'm trying to make, namely that, at retrial, the judge will always be in possession of more knowledge concerning the facts and the defendant's attitudes concerning his participation in the crime than he is in the guilty plea proceeding that started the process.

In our case, at the guilty plea sentencing, the -- the Defendant did admit that he had the kni-, had a knife. He did admit to having sexual intercourse with the victim in this crime.

However, what was left out and which was

subsequently developed at the trial was the atrociousness in the -- of the -- of the crime, the fact that this attack lasted for over an hour, and the fact that, not just one act of non-consentual sexual intercourse occurred, but that four acts of rape and two acts of sodomy were performed on this woman while the defendant was holding a knife to her throat.

Now, that's -- that idea is contested by the Respondent, the idea of the -- knife being held to the Defendant's throat. But the, there was a demonstration by the victim in the record, which, the -- the judge, observing it, later, in the motion for new trial, determined that that was what was going -- what was happening. And there is no doubt that the victim was -- I mean, the Defendant was threatening the victim throughout the -- this ordeal with the use of a knife.

So it's -- it's that relationship between the lack of information at a guilty plea versus the full information that the trial judge or the sentencing judge will have that makes the presumption of vindictiveness not appropriate in -- in this narrow situation.

The other -- the other issue we petition, well, if I may, I'd like to reserve the remainder of my time for rebut.

CHIEF JUSTICE REHNQUIST: Very well, Mr.

Bjurberg. Mr. Larkin?

ORAL ARGUMENT OF PAUL J. LARKIN, JR.

AMICUS CURIAE, SUPPORTING THE PETITIONER

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

The second question presented in this case, the one Mr. Bjurberg was just about to advert to, concerns the type of information on which a judge may rely in increasing the sentence a defendant first received when he pled guilty.

That question has considerable practical importance for the federal government, because, under the Sentencing Reform Act of 1984, a judge must always state his reasons for imposing a sentence. So the circumstances in which a judge, in a case like this, may increase a sentence, directly bears on that second question and is of considerable importance to us.

The Respondent argues that, when a defendant withdraws from a guilty plea, he can never thereafter have a sentence increased based on evidence that is developed at a trial and that, even if he can, he could not have his own sentence increased in this case because the reasons given by the trial judge were insufficient. We think that respondent's arguments are wrong as a matter of law and are irrational as a matter of policy.

The McCullough case decided by this Court three years ago made clear that a trial judge at a second sentencing proceeding may impose an enhanced sentence on a defendant if the judge relies on new and objective facts, facts that were unknown to the judge when he first sentenced the defendant. That condition was satisfied here.

As Mr. Bjurberg explained, at the time the judge resentenced the Defendant, he said that he was unaware that numerous rapes and sodomies had occurred on the night in question, and he said he was unaware that the victim had been threatened with a knife.

QUESTION: Do you think that that approach is consistent with the Court's decision in the Rice case, the companion case to Pearce?

MR. LARKIN: But in the Rice case, the Court applied a presumption and the Court said that the state of Alabama, in that case, at no time sought to dispel that presumption. Here, even if a presumption applies, under McCullough, it's clear the presumption can be rebutted. And, therefore, the McCullough case and the Rice case have to be read together.

If Rice adopts a presumption that would be applicable here, and we don't think the Court necessarily has to agree with that, but even if it does,

under McCullough, that presumption can be rebutted. And the Judge's reasons in this case are sufficient under McCullough to rebut that presumption.

QUESTION: But this case -- but this case he relied solely on the Rice case. The opinion cited Rice.

MR. LARKIN: Correct, Your Honor. It -- it --

QUESTION: And he relied on Rice alone.

MR. LARKIN: Correct.

QUESTION: And we have to say they're wrong.

MR. LARKIN: Correct. We don't think that the Court should have to read Rice to govern this case. Justice Kennedy asked that question, and I don't think you would have to overrule Rice in order to rule in the state's favor on the first question.

There are two different aspect of the ruling in Pearce. The first is the due process ruling that a defendant cannot be vindictively sentenced simply for having successfully set aside the first judgment. That is a basic due process principle, but is not necessarily this -- the one that is at issue in a case like this one.

That part, as Justice O'Connor asked, deals with a question of actual vindictiveness, and a defendant can always attempt to show actual vindictiveness. But what's at concern here in the first question is whether you should presume that the sentence

the judge imposed at the second sentencing proceeding was retaliatory in nature.

Now, in Rice, it is true, the Court did apply that presumption. But Rice was the companion case to Pearce, which first adopted this rule. Rice preceded, therefore, this Court's decisions in cases like Bordenkircher and Corbitt. And those cases are significant because those cases make clear that you can extend leniency to a defendant who accepts responsibility and enters a plea, and you can deny the same leniency to a defendant who refuses to accept responsibility and, instead, elects to go to trial.

So it's that type of rule which the Court has labeled a prophylactic rule that's at issue in the first question. And, just as the Court has been willing in a variety of contexts, such as exclusionary rule or the application of Miranda, to modify prophylactic rules when new situations show that it may be irrational to apply that rule in other contexts, so, too, the Court should be willing to modify the type of rule that was applied to Rice, himself, in light of the changed circumstances that have gone on in the 20 some-odd years we've had since the Pearce case was decided.

QUESTION: You're saying this rule would apply only to plea bargains, then?

MR. LARKIN: No, I think as an empirical matter, it -- the correlation between this rule and plea bargains is going to be very high. But I would think it, it could also apply in the case where someone just enters a plea.

QUESTION: Not if you distinguish it -- not if you distinguish Rice the way you've just proposed.

MR. LARKIN: Well, if you distinguish Rice that way and you exclude the plea bargaining process, then, yes. But I think one of the reasons for excluding the plea bargaining process is that, in that process, it's well-accepted -- in fact, the dissent in the court below stated that it was a custom to afford a defendant leniency in exchange for a plea.

Now, there will also be cases where a judge extends a defendant leniency in exchange for a plea where there's no plea bargain. That would probably happen normally in what would be called misdemeanors and minor offenses, not major felonies, where someone maybe isn't even represented by a lawyer, who pleads guilty.

A judge may, in that circumstance, also extend leniency to a defendant simply because the defendant has come in and said, "I did it. I'm sorry; I won't do it again and I accept responsibility." In fact, the federal sentencing guidelines have elevated this custom

to a rule. A defendant who accepts responsibility, under a plea bargain or not, or even after going to trial, is entitled to credit.

So, if you were to limit Rice in the way, uh, I said, just to plea bargains, then you wouldn't have to, as Justice Kennedy asked, overrule the Rice case. However, it's possible that the rationale for limiting Rice to plea bargains would also apply in other cases where there was no plea bargain, because a judge, in fact, bestowed leniency on someone for pleading guilty.

Respondent makes much ado of two facts in trying to say that the judge did not adequately rebut the presumption here. Respondent first argues that the judge relied on his subjective impression as to the crimes. That's true, but it's immaterial. As long as the judge relies on new and objective information, a judge is entitled to re-evaluate the heinousness of the crime or the incorrigibility of the defendant in coming to a -- a decision as to what particular sentence best serves the deterrent and retributive functions of the law.

The respondent also argues that there were no new facts elicited regarding the burglary rather than the sexual assaults. That fact is irrelevant. What the judge did here, essentially, was put together a

sentencing package to try to decide what sentence best served the -- the functions of the law and ensured, in this particular case, for example, the respondent either never is released from prison or is released only after serving a very long prison term.

There's no requirement in this Court's decisions, and in fact, the decisions in Wasman and McCullough or to the contrary, that the new facts directly relate to the crime for which the defendant is sentenced.

The McCullough decision and the Wasman decision basically show that what the Court has done, and, I believe, sensibly, has been to re-evaluate through experience the circumstances in which the presumption should apply and at which the presumption can be rebutted. That type of re-evaluation was properly applied in this case. The judgment below should, therefore, be reversed.

QUESTION: Mr. Larkin, if we agree with you, why shouldn't we give the Supreme Court of Alabama the chance to decide on this thing without the benefit of the presumption? I mean, even if we agree that the presumption shouldn't, should not have been applied, shouldn't the Supreme Court of Alabama have the chance to decide for itself whether, even absent of

presumption, there is evidence of -- of bias here?

MR. LARKIN: Yes. A defendant can always argue in a particular case that this judge, notwithstanding anything else, gave me five extra years or whatever, simply because I went to trial. And that's not permitted by Pearce. And that's the type of claim a defendant can make. Once the evidence is all considered, is then for an appellate court to make that, the inquiry whether the defendant is correct.

QUESTION: And that inquiry hasn't been made here, so -- so it would still be available to -- to the Supreme Court of Alabama to make that inquiry, no?

MR. LARKIN: You are correct on both counts. It was not made, and it's -- Alabama Supreme Court can consider it on remand. If there are no further questions?

CHIEF JUSTICE REHNQUIST: Very well, Mr. Larkin. Ms. Boyd, we'll hear from you when we resume at 1:00 o'clock.

(Whereupon, at 11:58 a.m., the Court recessed, to reconvene at 1:00 p.m. this same day.)

AFTERNOON SESSION

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll resume the argument in Alabama against Smith. Ms. Boyd.

ORAL ARGUMENT OF DELORES R. BOYD

ON BEHALF OF THE RESPONDENT

MS. BOYD: Mr. Chief Justice, may it please the Court:

I want to begin by trying to restore the proper factual context for this case and I will start with the question raised by Justice Stevens, whether plea bargaining is at all critical to this Court's determination of the case. The answer is absolutely not. Plea bargaining, as a practice, as a policy, is not implicated on the facts of this case.

What we have here is a simple guilty plea that results in a conviction. The Defendant is charged with three crimes. The plea agreement is quite simple. He pleads guilty to two of those crimes. In exchange, the prosecutor agrees to drop the third. There is no concession --

QUESTION: Well, isn't that a bargain?

MS. BOYD: There was a bargain that included --

QUESTION: That's the bargain. He gives up -- he gives up the right to trial in exchange for pleading

to two instead of three offenses.

MS. BOYD: Justice O'Connor, that's absolutely correct. What is distinguishable, though, is that the bargain did not include any negotiations or concessions at all with reference to sentencing.

Why that is critical is that the state has lost absolutely no advantage. When that guilty plea conviction was reversed, all the state did was reinstate the third crime and the Defendant then went to trial on all three crimes.

So we don't have the usual situation, as is suggested in the cases presented by both the government and the state, of a defendant and a prosecutor, sometimes involving the judge, hassling about a sentence. And the defendant then changing his mind because he gets a sentence that he didn't believe that he should have gotten, then wanting to withdraw the guilty plea.

This is not just a withdrawn guilty plea; this is a conviction that gets reversed because the sentencing judge made errors that invalidated the guilty plea on constitutional grounds.

QUESTION: Well, do you concede that, at least as to the third charge that was restored when he went to trial, that the judge had complete flexibility within

the statutory sentencing scheme to sentence for that offense?

MS. BOYD: Justice O'Connor, that is clear on the record. It's important, though, that that crime is not before this Court. It wasn't before the Alabama Supreme Court, and it's not before this Court. This Court and the Alabama Supreme Court have just one conviction and one sentence to deal with. That is the sentence that had to do with burglary, not rape, not sodomy.

The question here is classic Pearce question. In the instance when a sentencing judge applies a sentence upon a conviction, whether it's based on a guilty plea or based on a jury verdict, may that same sentencing judge, upon reconviction, come back and enhance the sentence?

The Rice case that dealt with Pearce, that, that was affirmed by this Court in Pearce, is precisely on point. I take issue with the state in suggesting that this is not the Rice case.

QUESTION: What about the sodomy charge, uh, Ms. Boyd? The -- that -- that was the subject of -- of the original, one of those -- one of the counts that was subject to the original guilty plea, wasn't it?

MS. BOYD: No, sir.

QUESTION: It was not?

MS. BOYD: Burglary and rape and sodomy were all charged. The Defendant pled guilty to burglary. He pled guilty to rape. The sodomy indictment was dismissed. The Defendant then received 30-year concurrent sentences on burglary and rape.

Mr. Chief Justice, you inquired earlier about why those --

QUESTION: Thirty years on each?

MS. BOYD: Yes, sir.

QUESTION: Concurrent?

MS. BOYD: Concurrent.

QUESTION: It was a -- a sentence of from two to 30 years?

MS. BOYD: No, sir -- no, Your Honor. The -- the sentence was a 30-year sentence for burglary, a 30-year sentence for rape. They were to run concurrently. Thereafter, the Defendant exercised a right that Alabama statutes provided him. That right was to appeal to the Alabama Court of Criminal Appeals the constitutional sufficiency of the conviction, based on the guilty plea.

He appealed it, Mr. Chief Justice, responding to your earlier question, he appealed it because he believed that he was not mentally coherent when the

guilty plea was taken, and that, therefore, the guilty plea itself was deficient.

Now, the Alabama Court of Criminal Appeals did not address that specific contention but found, nevertheless, that the guilty plea was constitutionally deficient because the trial judge had absolutely refused or declined to properly inform the Defendant of the maximum sentence he was exposing himself to by pleading guilty. That's a constitutional prerequisite.

Therefore, the Alabama Court of Criminal Appeals very reluctantly said, "We have no choice but to vacate this conviction." Thereafter, he went to trial on all three cases.

QUESTION: And what, what charge was added, again?

MS. BOYD: Sodomy.

QUESTION: Sodomy.

MS. BOYD: Sodomy at that point was reinstituted and that is why, Mr. Chief Justice and members of the Court, the state has lost nothing in its bargain. That is why we don't have to inquire whether leniency ought to be given to the Defendant.

QUESTION: What -- what, what were the new sentences?

MS. BOYD: The new sentences were these:

burglary, life; sodomy, life, to run concurrent. On the rape, 150 years, to run consecutive to the other sentence. For whatever reason, trial counsel chose not to appeal to the Alabama Supreme Court the convictions on the rape and the convictions on the sodomy.

The Alabama Court of Criminal Appeals, in fact, remanded the rape conviction, indicating that that 150-year sentence exceeded the statutory permissible sentence. So the only sentence that should command our attention is the life sentence for burglary. And why does Pearce apply? Pearce applies --

QUESTION: You think the rape sentence has been -- set aside entirely?

MS. BOYD: It has not yet, because the Alabama Court of Criminal Appeals remanded that. Thereafter, the state petitioned for cert, everything has been put on hold. But the trial --

QUESTION: Anyway, it's not in effect; it was set aside, wasn't it?

MS. BOYD: In effect, it was set aside as statutorily exceeding the maximum.

QUESTION: Right. Thanks.

MS. BOYD: Why does Pearce apply? In this case, we don't, Justice Scalia, have to remand the case to the Alabama Supreme Court. I believe Justice

O'Connor raised that same inquiry. Should we send it back and make some determination on actual vindictiveness? No. That determination has been made.

This Defendant raised his realistic apprehension of retaliatory motivation at the trial court. He raised it in a motion for new trial; he raised it at the outset when he tried to get this judge to recuse himself. And he had very good reason for being apprehensive. So that, there -- there are really two reasons Pearce --

QUESTION: But I didn't think the Court of Appeals had addressed itself to that question of actual vindictiveness.

MS. BOYD: Justice O'Connor, the Court of Appeals did not detail in its opinion any -- any -- analysis of it, but, as I read the Alabama Supreme Court opinion, the, it held that the presumption wasn't overcome. It addressed itself to whether the trial court could rely upon the information elucidated at trial about the details of the offense.

Before it could make that inquiry, it had to consider the Defendant's arguments, and the Defendant's arguments were simple. We believe that this judge is penalizing us because we chose to appeal the guilty plea condition.

QUESTION: Well, I thought the Supreme Court of Alabama applied the Pearce presumption and that that was how the case was resolved. I didn't understand it to have addressed the actual vindictiveness question.

MS. BOYD: The Pearce presumption is a presumption of vindictiveness upon the occurrence of certain factors.

QUESTION: Right. I didn't understand that the Supreme Court of Alabama ever looked at the question of whether there was actual vindictiveness here.

MS. BOYD: Its opinion does not set forth an analysis. The fact that it looked at it has to be suggested by the fact that it went on to determine whether it was overcome. It determined whether the trial court could rely upon details of the crime as they were elucidated at trial. Another reason we know that that is --

QUESTION: Excuse me, I -- I -- I -- I'm -- I -- I'm not sure I'm understanding you. If you have a presumption, you don't have to listen to the defendant's evidence. I mean, he -- he may -- say, "Boy, this judge was really vindictiveness," and the judge would say, "I don't have to listen to that." We take as a given that he's vindictive. That's what the presumption means.

MS. BOYD: Pearce --

QUESTION: It's up to the state to refute that presumption. Isn't that what the Alabama court did? That's what I thought it did.

MS. BOYD: What the Alabama court did, Your Honor, was say that the evidence that was offered by the state --

QUESTION: Was not enough.

MS. BOYD: -- was not enough. So presumption wasn't overcome.

QUESTION: To overcome the presumption. Right.

MS. BOYD: Yes.

QUESTION: But, now, if we disagree with that -- and this is what Justice O'Connor and I were getting to -- if we disagree with that, if we think there shouldn't have been a presumption, we would still have to send it back so that Alabama could then consider, had there not been a presumption, would we have found on the facts that there was vindictiveness. Don't -- don't you think we'd have to do that?

MS. BOYD: Well, Your Honor, I believe that there is ample evidence on this record to support the Supreme Court's finding. Now, to, to answer you directly, if you disagree with that, the proper inquiry would be to send it back for specific findings on the presence of vindictiveness.

QUESTION: All right.

MS. BOYD: But, in so doing, you would not, based on your own case law, be asking the Alabama Supreme Court to actually find actual vindictiveness, because --

QUESTION: Unless we disagreed that Pearce as applicable here.

MS. BOYD: Yes, Your Honor. The point I'm about to make is that -- actual vindictiveness, because it is so difficult to ascertain, can be a function of a finding that there are realistic indicators here that support a likelihood of vindictiveness.

QUESTION: But, there -- those are two different inquiries. One is, one is whether the -- a -- vindictiveness is so likely under a particular set of facts, that there ought to be a presumption of vindictiveness.

And then, there -- it's -- even if you say, no, there are no other explanations in cases like this, so you don't apply a presumption of vindictiveness. You could still find actual vindictiveness.

MS. BOYD: I agree. And that is what McCullough and that's what most of the post -- case law after Pearce say. My point is, if you believe that the Alabama Supreme Court did not make a finding of actual

vindictiveness, I am simply suggesting that the record here shows that the finding was based on realistic likelihood of vindictiveness, that there, there is enough in the record to support that finding.

QUESTION: But that's opposed to the -- that goes to whether the presumption should apply and not to whether there was, in fact, actual vindictiveness.

MS. BOYD: The presumption should apply, Your Honor --

QUESTION: That -- that -- that's what you say. But the -- state disagrees.

MS. BOYD: Well, let -- let -- let me go directly to some reasoning for why the presumption should apply. When this Court, in Pearce, talked about whether we look to an actual evidence of motivation or whether there are other indicators, it gave guidance in the case law that followed.

One reason this presumption ought to apply here is that we have the very same sentencing authority who has demonstrated on this record both a personal interest and an institutional interest in having a retaliatory motivation against this Defendant.

QUESTION: Suppose this were a different judge. All the facts are the same except there's a different judge on the second time around. What -- what

results? (A), a presumption?

MS. BOYD: This Court has held that a different Judge would make a difference. I believe that, on the facts of this case, there would be a lesser likelihood of vindictiveness with a different Judge.

I'm not willing to embrace, as -- as a general rule, a different Judge makes a difference. But, in this case, this particular judge had so integrated himself on the issue of guilt at the first sentencing hearing that I think these facts are distinguishable. These facts require the presumption --

QUESTION: But I thought that, in considering whether the Pearce presumption should apply in a given situation, we look to the generality of cases and the likelihood of whether, in all cases, there is such a realistic -- likelihood of vindictiveness that we should, in fact, apply a presumption. I didn't think we did it case by case to say, "Gee, on these facts, should we have a presumption?"

MS. BOYD: Although this Court's opinion in McCullough, the majority opinion was not embraced by this entire Court, it specifically suggested that it is a case-by-case analysis that ought to be employed because of the difficulty in ascertaining actual vindictiveness.

This case almost cries out for an analysis of this judge's role. Here is a Judge who admits on the record, before he makes the first sentence, that he has received from the defendant, without knowledge of the defendant's lawyers, letters, which, in, in his own statement, bear out, substantiate and corroborate the defendant's guilt.

Here is a guilt who, at the initial sentencing hearing, expresses on the record that he himself is convinced of the Defendant's guilt, calls up to the bench someone totally unrelated to the proceedings, the defendant's alleged girlfriend, hands her the letters that the court has received ex parte, and says to her, "You read them." And after she concludes them, makes the inquiry, "Now, are you as satisfied as I am that he is guilty?"

Here is a Judge who moves on on a motion for a recusal after the conviction is overturned, and again indicates, "I received your letters. I know you're guilty." What -- whar greater interest does he need to invince when he has to sit through a trial, presumably to determine an issue that he's already made up his mind on.

QUESTION: But, Ms. Boyd, may I -- may I ask you a question at this point? What, I don't understand

your position. Is it your view that, whenever a judge takes a guilty plea and has, maybe, a hearing to be sure there's enough factual support to take the plea, that, thereafter, the judge is disqualified from trying the case if the plea later is withdrawn?

Because, in every case, the judge has pretty good reason to believe the defendant's guilty if he's entered a plea.

MS. BOYD: No, Your Honor. What I am suggesting is that there needs to be an analysis of whether the sentencing judge has so completely engaged himself in the factual issue about the guilt at the initial sentencing hearing that his impartiality --

QUESTION: But doesn't he have a duty to do that? Isn't that a normal thing to do for a trial judge, to make sure the defendant's guilty and get some sense of the seriousness of the crime to inform him or her on what sentence to impose?

MS. BOYD: What is not normal is what the trial judge did here. In addition to taking the guilty plea and ascertaining the factual basis, he read letters that were sent to him --

QUESTION: By the Defendant --

MS. BOYD: -- by the Defendant, without, uh, advice of counsel, without knowledge of counsel, and he

stated his own adoption of -- of the implications of guilt that came in those letters. And that guided him as he went to the retrial.

QUESTION: But that was after the defendant had entered a guilty plea.

MS. BOYD: It was before his sentencing, however.

QUESTION: Yes, I understand. But I, I don't see why you're -- why it's wrong, after a defendant has entered a guilty plea, for the judge to accept what -- whatever factual information might come to his attention that corroborated the fact of guilt. I just don't understand.

MS. BOYD: Well, if that judge was not the same judge, to proceed with the retrial --

QUESTION: Well, but I think what you're really arguing is that the sent -- the judge who accepts a guilty plea should never handle the retrial.

MS. BOYD: No, I'm not arguing that, Your Honor. This judge should not have handled the retrial.

QUESTION: All the things that you say that this judge did only go to convincing him that this Defendant was guilty. But a judge should always be convinced that the defendant's guilty before he accepts a guilty plea.

You don't want a judge accepting a guilty plea unless he believes the defendant's guilty, do you? So that's -- so the situation you're complaining about will always exist when there's been an acceptance of a guilty plea.

MS. BOYD: What this judge did went beyond the initial guilty plea, Your Honor. The Defendant had an apprehension --

QUESTION: Well, so much the better. He was really sure the guy was guilty. You're not, I, I --

MS. BOYD: Well, what do we do with the defendant's due process right to believe that he is going to have a fair trial at the hand of a judge who has no predisposition --

QUESTION: I'm not talking about that. I'm just talking about your answer to Justice Stevens' question. Don't you have to answer Justice Stevens' question? Yes. Whenever you're sent back, you can have the same judge who's accepted your guilty plea.

MS. BOYD: That is the preferred procedure. That is not, from a policy point of view, a practical procedure. And that is why I did not embrace that, is what I'm asking this Court to do. This Court doesn't even have to go that far.

This Court need only analyze what information

the judge had at the time of the second sentencing and whether that information disqualified him from making a sentence free from vindictiveness.

QUESTION: But that -- that, but that -- you -- you're almost arguing that the judge should have disqualified himself, uh, from trying the case.

MS. BOYD: He was asked to do so and he was asked to do because the Defendant had a reasonable basis for --

QUESTION: But, but that, that, that isn't the point here. The, the Alabama courts didn't decide in your client's favor on the basis that the judge should have disqualified himself. They decided in your client's favor on the basis that the Pearce presumption applied.

MS. BOYD: The Pearce presumption, Your Honor, as I read Rice and the underlying case, is grounded on a due process right that recognizes not only actual vindictiveness, but a defendant's perception of vindictiveness. So, by asking this judge to disqualify himself, the defendant himself was indicating his own belief that he could not have a fair trial at the hands of this judge.

Why does that -- why does that matter for the Pearce presumption? It matters for the Pearce

presumption because it goes to whether there is a realistic likelihood of actual vindictiveness. A retrial here was necessary solely because the sentencing judge made errors of a constitutional magnitude. That was a finding of the Alabama Court of Criminal Appeals. And it was a finding that was very scathing as to the omissions of the trial judge.

QUESTION: May I ask one other question about the procedure here? Maybe it doesn't affect the legal arguments, but, am I -- do I correctly understand that the third charge was dismissed during the plea negotiations, was the sodomy charge, and after trial he was convicted of sodomy and given a life sentence on that charge, and you don't challenge that life sentence?

MS. BOYD: It was not challenged below and that's why it's not here.

QUESTION: So you -- so you -- it's not before it. So, regardless of how we decide this case, this gentleman will probably spend the same time behind bars.

MS. BOYD: Well, the difference is that, uh, the sentences were to run concurrently.

QUESTION: Well, they do run concurrently, don't they?

MS. BOYD: Burglary and, and sodomy, at the second sentencing were both life sentences running

concurrently. The 150-year rape sentence was a consecutive sentence. So what your -- what your determination is on the burglary affects the sodomy anyway, and I'm sure that is perhaps why trial counsel did not raise that in the courts below.

QUESTION: You say it -- it does or does not affect?

MS. BOYD: It does -- it does affect it because it's the sentence that's running concurrently. It is the same sentence. Life. And it's running concurrently with the one that's --

QUESTION: Yeah, but if you -- if we vacate the burglary sentence, if you totally vacate the burglary sentence, the sodomy sentence would stand, wouldn't it?

MS. BOYD: The sodomy sentence would stand. I believe that it would have to back -- to the court for -- the sodomy sentence would stand. It, it is simply a concurrent-running sentence.

QUESTION: Yeah. I mean, it -- it -- I understand the legal issue is there and all the rest of it, but it really doesn't make an awful lot of difference to your client how we try this case -- how we decide this case, as I see it.

MS. BOYD: Well, I think it does, Your Honor.

If -- If -- If this Court is still to give any credence to whether we ought to be concerned about the defendant's right to be free from the apprehension of a retaliatory motivation, it matters to Mr. Smith whether the burglary sentence --

QUESTION: Well, I understand that, that argument, yeah.

QUESTION: But it wouldn't affect at all the length of time he would serve on the sodomy case.

MS. BOYD: It would not, but then, again, this -- he is still free to make some appellate, uh, challenges on the sodomy sentence, because we haven't gone back on remand yet.

He's still free, perhaps, because the trial court has not entered any orders after the Alabama Court of Criminal Appeals and after the Alabama Supreme Court's, uh, vacation. He's still free, perhaps, to, uh, deal with the federal habeus charge.

QUESTION: Well, the Alabama Supreme Court seemed to think that it should decide, uh, the validity of the burglary sentence.

MS. BOYD: That it should or should not?

QUESTION: That it should.

MS. BOYD: That was the only thing before it.

QUESTION: Yes. Well, but the sodomy sentence

was there. Why did they want to decide the validity of the burglary sentence?

MS. BOYD: I was not trial counsel. I do not know why that was not brought up to the Alabama Supreme Court. But the Defendant may still have federal habeus challenges to deal with the sodomy. So it does matter what this Court does with burglary. The burglary sentence was enhanced, and it was --

QUESTION: Well, you still would have to exhaust your state remedies with respect to the --

MS. BOYD: And whether they have been exhausted is still in question, because it hasn't gone back on remand.

QUESTION: Or, or, or whether they've been, or whether they would now be procedurely barred?

MS. BOYD: I think both issues are still open because of the procedural posture of this case. So it does matter what this Court does.

Let me turn to the issue of, if Pearce applies, has it been overcome?

In that connection, we do not advance the absolute rule that the government suggests, and that is that a trial court should never be free to consider facts of the offense as they are revealed at trial. That is not our argument.

Our argument is, number one, Pearce requires the trial court to affirmatively record on the record, and this trial judge didn't do it. We're not talking about rape, we're not talking about sodomy. The question is whether this trial judge advanced anything at all on the record to justify enhancing a 30-year burglary sentence to life. The record is absolutely void and, under Pearce, that should end the inquiry.

The government and the state suggested this is some type of package deal and the -- and -- and the trial court should have had the right to listen to the details of the rape at trial and consider that enhancing the sentence. Why that's fallacious is that all three crimes called for separate penalties.

QUESTION: Well, but we -- we allow even, even when crimes are -- are not prosecuted simultaneously with the -- with the crime that he's being sentenced for, and, indeed, even when he hasn't been convicted of them yet, we -- we allow, at the penalty phase, other crimes to be considered, or other unlawful conduct to be considered in deciding what -- what punishment to impose for this one.

MS. BOYD: Justice Scalia, that may be the case, but we don't need to speculate that this trial judge did consider those other crimes. There's nothing

on the record that suggests that he decided to enhance the burglary because of evidence he heard on rape because he also enhanced the rape.

It could very well be that the evidence he heard on rape and sodomy was so atrocious that he decided to make the enhancement there.

QUESTION: Well, lookit -- he, he did say, "I didn't know that there had been so many rapes. I didn't know there had been sodomy before." And your only complaint is that he didn't go ahead and say, "And for that reason, I am imposing a higher sentence, not only on rape and sodomy but also on the burglary count."

Uh, it, it is just his failure to mention the word "burglary" is, is what your case comes down to?

MS. BOYD: Well, Pearce requires him to justify each sentence. We shouldn't have to speculate that the justification for burglary -- especially since the record doesn't show any new evidence -- that the justification for burglary ought to be the justification for rape.

QUESTION: It shows new evidence of other crimes.

QUESTION: Ms. -- Ms. -- Ms.-- Boyd -- now, I am reading from the Supreme Court of Alabama opinion -- the -- page 3 of the appendix. And, as I understand it,

this is Justice Jones and his opinion giving a summary of what had happened.

"After a sentencing hearing, the petitioner was sentenced to life imprisonment for the conviction of first-degree sodomy, which term was to run concurrently with a life term for the first-degree burglary conviction. The Petitioner was also sentenced to a term of 150 years for the conviction of first-degree rape."

Now, is -- is that the -- these, that's a correct statement of what happened?

MS. BOYD: That is a correct statement.

QUESTION: So the -- the -- the 150-year consecutive sentence is for rape?

MS. BOYD: Yes. Initially, the concurrent sentences were for burglary and rape. Initially, Your Honor, that was the 30-year concurrent sentence. Upon retrial, what ran concurrently were the burglary and sodomy and the consecutive sentence was rape. That is what you're reading now, the Alabama Supreme Court, upon -- after the second sentencing.

QUESTION: Well -- well, getting back to the burglary conviction, the, uh, element of, the offense of burglary is "entry with the intent to commit a crime." And so the crime that was committed, it seems to me, does necessarily and logically enhance the burglary

sentence itself.

So that the trial judge was -- was entitled, based on this record, to consider the nature of the offense that was committed after the burglary in sentencing for the burglary. That's part of the definition of the crime.

MS. BOYD: Justice Kennedy, the legislative scheme for -- for punishment of burglary, rape and sodomy considered -- took into consideration the fact that a burglary is entry of a residence to commit another crime, and, in doing so, categorized it as a Class A felony, separately punishable.

We could just as easily say that the judge decided to take into consideration the fact that this defendant had taken an appeal of a burglary conviction and had embarrassed him before the Alabama Court of Criminal Appeals by having that court remind the trial judge that the guilty plea was constitutionally deficient.

That is so -- that is why it is important that the information that the trial judge rely upon be specifically stated as to the crime. Now, if you believe that what he stated was adequate, then test it by whether it was objective and whether it was new, whether was anything at all that he didn't know before.

All we have is he didn't know that there were five rapes. Now he knows that. That may justify enhancing the rape, but it shouldn't justify enhancing the burglary against the backdrop of those other factors. I'm suggesting, Your Honor, that you cannot divorce a determination in this case of whether the additional information was adequate from whether there existed indicators of a retaliatory motivation for this trial judge.

To -- to do so would simply give the trial judge a convenience excuse to mask his vindictiveness. He is always going to hear more at trial than he is going to get at the guilty plea. There is always going to be more about the flavor of the trial -- of -- of the offense itself, more details.

So if he has a reason to be vindictive against this defendant in the first instance, all he need say is, "Well, now I've heard more evidence at trial. I understand now you did five rapes. There were two or three other crimes." That is why the rule that we advance is not an absolute rule. It is a case-by-case proposition. Thank you.

QUESTION: Thank you, Ms. Boyd. Uh, Mr. Bjurberg, do you have rebuttal?

MR. BJURBERG: No, Your Honor, I don't.

CHIEF JUSTICE REHNQUIST: Very well, the case is submitted.

(Whereupon, at 1:29 o'clock p.m., the case in the above-entitled matter was submitted.)

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BY Judy Freilicher

(REPORTER)