ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NORM MALENG, ETC., ET AL., Petitioner v. MARK EDWIN COOK

CASE NO: 88-357

PLACE: WASHINGTON, D.C.

DATE: March 27, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

NORM MALENG, ETC., ET AL., :

Petitioner :

v. : No. 88-357

MARK EDWIN COOK :

Washington, D.C.

Monday, March 27, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:50 o'clock a.m.

APPEARANCES:

KENNETH O. EIKENBERRY, ESQ., Attorney General of Washington, Olympia, Washington; on behalf of the Petitioner.

JOHN B. MIDGLEY, ESQ., Seattle, Washington; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

(10:50 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-357, Norm Maleng v. Mark Edwin Cook.

General Eikenberry, you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH O. EIKENBERRY, ESQ.

ON BEHALF OF THE PETITIONER

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

I'm appearing here this morning in opposition to a petition by prison inmate Mark Edwin Cook for issuance of the great writ of habeas corpus.

The question presented here, in our view, is this: does a Federal Court have subject matter jurisdiction over a habeas corpus challenge to a 1958 robbery conviction, the sentence for which had expired before the petition was filed but which may have an effect on the length of time to be served in the future on another sentence for an unrelated crime.

Now in addition to this issue, which may be viewed as somewhat technical, we think there's an additional and necessarily related question, and that is what are the standards and the scope of review to be applied in a challenge to the length of that future

sentence.

QUESTION: I take it that -- may we consider this case just as though he was actually serving a state -- what if the state is the one that had him in jail, that has him in jail now? He's now serving a federal sentence?

MR. EIKENBERRY: That is correct, Your Honor. In fact, I'd like to suggest that there four, actually four convictions here that all interplay with one another.

QLESTION: Yes, but suppose he was now serving the '78 sentence, state sentence? You would still be making the same argument?

MR. EIKENBERRY: Yes, Your Honor, we would.

If I may, I'll list those four convictions because they do interplay and I believe will have a bearing on how the Court looks at this case.

QUESTION: Well, I didn't think it would have any bearing. I thought you said it would be the same situation if he were now serving the '78 state sentence.

MR. EIKENBERRY: The thing I'd like to do, Your Honor, is posture this so that we're focusing on the distinction.

QUESTION: The latest state sentence is '78?

MR. EIKENBERRY: Yes, Your Honor.

QUESTION: And that's the one that was enhanced by the '58 sentence, is that right?

MR. EIKENBERRY: Well, we'd like to reserve using the word "enhancement", Your Honor, and get to that.

QUESTION: Okay.

MR. EIKENBERRY: But the beginning point, of course, was in 1958, where Mr. Cook was convicted of three counts of robbery and sentenced to three terms of not more than 20 years. That sentence has now expired, which we think is a critical feature of the case before the Court.

The second conviction was in 1965, when Mr. Cook was convicted of three counts of robbery and sentenced to three 50-year terms, and, incidentally, a detainer has been placed on that conviction.

The third conviction occurred in 1976 in federal court, when Mr. Cook was convicted of robbery and conspiracy with 25 and 5-year terms, and that is the case on which he is now in custody at Lompoc, California.

And then the fourth and final conviction that brings us to court today is a conviction in state court in 1976, with the sentencing occurring in 1978, in which he was found guilty of two counts of assault in the first degree and sentenced to two life terms and then

another count of aiding a prisoner to escape, with a 10-year term.

QUESTION: Was that sentence enhanced by reason of the '58?

MR. EIKENBERRY: Your Honor, there was no grid or anything at that point which we would say that the court looked in determining what length of time there would be. Rather, it was simply a matter of the '58 conviction having been in the background, the sentencing court in '78 being aware of it, and the impact that may or may not have had on that maximum term of two life terms we can only guess.

QUESTION: I know. But even if it were -- you would be making the same argument you're making even if it were expressly enhanced by the '58 sentence?

MR. EIKENBERRY: Yes, Your Honor, we would be. You are quite right.

QUESTION: General Eikenberry, there's something that gives me pause here. I'm not sure it was raised by any of the parties, but it's certainly part of the statutory basis of jurisdiction, and that is that the defendant, the prisoner, at this time is not in the custody of the State of Washington.

MR. EIKENBERRY: That's absolutely correct, Your Honor. Well, except we would concede to the extent

that a detainer has been placed for that '78 conviction, that perhaps that the issue or that custody has been created in the '78 sentence.

QUESTION: Well, what of our cases would you say supported that proposition?

MR. EIKENBERRY: I would suggest, Your Honor, the custody cases such as --

QUESTION: Such as? I mean Peyton against Rowe was two successive sentences, both by Virginia courts, and at the time it was challenged Virginia had custody.

MR. EIKENBERRY: Well, I would suggest the Carafas case, the Jones and the Hensley cases all suggest that the kind of detainer restraint based on the '78 sentence that has been placed against Mr. Cook would be equivalents, Hensley being an individual out on bond during appeal, Jones being a person who had been paroled, and then Carafas being a person who had filed, of course, while he was in custody serving a term.

QUESTION: How long remains on the federal sentence?

MR. EIKENBERRY: I'm sorry, Your Honor?

QUESTION: How long remains on the federal sentence?

MR. EIKENBERRY: I cannot say. He was

sentenced in '76 and it was a 25-year term, so his actual time -- I suppose he's approaching the time when he might be considered for release, but it would be to the detainer that's been placed by the State of Washington.

QUESTION: Was the federal sentence expressly enhanced by virtue of the '58 conviction?

MR. EIKENBERRY: We do not know, Your Honor, but the point of the question I think is extremely important because we are seeing the prospect here that we must imagine that that court also was aware that a '58 conviction had occurred and would have had it in mind, taken it into account as the court settled on the 25-year term. So they may or may not, but we would have to bet probably was an effect on that sentence imposed in '76 by the federal court.

And so the interesting question then would be, does that create the custody that Mr. Cook is asking for in the '58 conviction, and we assert that it does not.

QUESTION: Well, he certainly is in custody under the federal sentence.

MR. EIKENBERRY: Physical custody, yes, Your Honor.

QUESTION: So presumably he can raise whatever he wants to with regard to the basis for that sentence.

MR. EIKENBERRY: He can raise the -- he is in custody for the physical custody that he's in under the federal case. We would suggest that he is in custody for --

QUESTION: Is that part of what his amended pleadings now challenge and raise?

MR. EIKENBERRY: No, Your Honor. I believe the amended pleadings, if the Court is referring to the letter that was sent in just last week, was intending to move from a challenge to the 1958 conviction to expressly name the 1978 sentence. And we believe that probably that was because he's trying to get around this jurisdictional problem that we're walking up on here.

QUESTION: Well, I thought there was a specific notice of amendment of the original petition that was filed in the District Court in Washington.

MR. EIKENBERRY: Just last week, Your Honor, yes.

QUESTION: Not a letter, a notice of an amendment?

MR. EIKENBERRY: I'm sorry, yes. It was forwarded to us. We received it in our office. We sent a copy to this Court and so that attempt has been made. Whether it's effective or not, we would suggest it is not. But certainly the basis upon which the Court will

proceed I think is not influenced significantly.

QUESTION: General Eikenberry, can I ask you just a question going to sort of what I understand to be your basic position? Supposing this was a capital case instead of a man, life and 50 and 20, and all these long-term sentences, it was a capital case and one of the aggravating circumstances was a conviction back in 1958.

And the only claim he wants to make is a challenge to that conviction, and he brings it into state court and raises that challenge. Would there be jurisdiction to consider that, in your view?

MR. EIKENBERRY: There would be jurisdiction to consider the sentence under which he is in immediate restraint, Your Honor.

QUESTION: Well, he's immediately under on a capital sentence.

MR. EIKENBERRY: Exactly. And then the question is what kind of challenge may be brought to that previous conviction that was used and considered in imposing the death penalty. And what we're submitting to the Court is that the review given to that earlier conviction is different in scope than what would be given to the immediate trial and the immediate conviction, because the review would simply look to see

whether or not the previous convictions were invalid on their face or whether they had previously been determined by another court to have been invalid.

And we're thinking here, for example, of the Tucker case, in which the trial court had learned of three felony convictions of the defendant before him, and then when it came time for sentencing the court specifically considered those three convictions, and only after the sentencing learned that two of them were invalid on their face when the record came before the court. And that matter was then before this Court and it was sent back for resentencing.

So there was a case of the general rule being that a sentencing court or a reviewing court will allow a sentencing judge to consider a wide range and a very loose sense and flexible standard as to the convictions that may be considered. But --

QUESTION: If I understand you correctly, your answer to my question is yes, that you could look at the old conviction.

MR. EIKENBERRY: Yes, Your Honor.

QUESTION: And why is this different?

QUESTION: I thought your answer was no.

MR. EIKENBERRY: What I'm saying is --

QUESTION: It wasn't very clear.

MR. EIKENBERRY: What I'm suggesting, Your Honor, is the court would use a very narrow scope of review.

QUESTION: Well, but that may be a narrow scope of review. The question that we've got here is the subject matter jurisdiction question, whether there is any review at all. And I take it your position is you just can't look at it, period, if the earlier conviction has expired by its terms.

MR. EIKENBERRY: Yes. We're submitting, Your Honor, that Mr. Cook in no way is, in the words of section 2254, in no way is he a person in custody pursuant to the judgment ordered by our state court in 1958.

QUESTION: Well, now what if the '78 conviction were a habitual offender. The Washington statute says if the sentencing judge finds in the sentencing procedure that you have two additional felonies, then you can be committed for 20 years where under the '78 charge you could only be committed for 5 years. The sentencing judge does find that there was an additional felony committed in '58 and so he sentences him as a habitual offender.

Is that reviewable if he's in custody under the '78?

MR. EIKENBERRY: Yes, because there is a critical difference in the kind of proceeding the Court's just described. That is a habitual criminal proceeding. The defendant is being found guilty of a new status. It's a different crime, if you will, and so that's all part of the newest conviction and sentence, and it is reviewable.

QUESTION: Okay. Well, then what was the situation with respect to what the '78 sentencing judge did with respect to the '58 conviction? Did he say in so many words that I'm taking this into account, I'm giving you a heavier sentence?

MR. EIKENBERRY: No, Your Honor, he did not say that, and we cannot, I don't think we can know at this point exactly what role, if any role, it had in determining that Mr. Cook should be sentenced to two life terms.

Now I should mention and anticipate the argument that you'll hear in a moment because in addition to the sentence to two life terms Mr. Cook, when he comes back to the State of Washington, will go before a parole board, if you will, and his minimum term will be set. And we've had more events in the meantime.

QUESTION: The Court of Appeals for the Ninth Circuit thought that the '76 sentence was enhanced by

the '58, didn't it? Otherwise you wouldn't be here, I don't suppose.

MR. EIKENBERRY: Yes, Your Honor, that's correct.

QUESTION: And you say that whatever enhancement there was was permissible and if there was an enhancement it was permissible and that since the '58 -- and it doesn't make any difference whether the '58 conviction was valid or not because it's expired and you just can't be in custody under that.

MR. EIKENBERRY: That's correct, Your Honor.

QUESTION: Don't let anybody put words in your mouth.

MR. EIKENBERRY: Your Honor, we are saying he's not in custody on a 1958 conviction, but we may review the '78 conviction --

QUESTION: Even if, as CA 9 held, there was enhancement by reason of the '58 conviction?

MR. EIKENBERRY: Yes, Your Honor, that's true. And, taking the next step, then, the only review that will be given to the 1958 conviction that's been considered by the '78 sentence in court is whether it's valid on its face or whether some other court has determined --

QUESTION: And would you have the same

qualification for review in the case that the Chief Justice put to you where there's a habitual offender statute?

MR. EIKENBERRY: The review would be broader, Your Honor.

QUESTION: Why?

MR. EIKENBERRY: Because there we're looking at the conviction and the basis for it, and just as an entire larceny trial would be, conviction would be subject to review. It would be the same kind of thing.

QUESTION: So under a habitual offender statute a previous offense can be tested on habeas?

MR. EIKENBERRY: Yes, Your Honor.

QUESTION: For invalidity in any respect?

MR. EIKENBERRY: For this reason, Your Honor. At habitual criminal trial we plead that the defendant has just been convicted on whatever the current charge is and then we plead that he's been convicted on, say, three other convictions.

QUESTION: Well, then suppose all of those convictions are valid on their face. Suppose none of them have been set aside by a state court. There is still habeas jurisdiction to attack those three convictions, in your view?

MR. EIKENBERRY: Yes, Your Honor, because they

are elements of the new conviction that the court has just reached in sentencing.

QUESTION: Well, what's the federal violation? I don't know why you concede that. What's the federal law issue?

MR. EIKENBERRY: I'm not understanding the Court's last question.

QUESTION: The hypothetical is the habitual offender statute, previous convictions. The previous convictions are valid on their face, they have not been set aside by any state court, and the prisoner seeks federal habeas to attack those earlier convictions in order to modify or vacate the habitual offender statute.

I'm asking you what is the federal violation.

MR. EIKENBERRY: I'm assuming the prisoner would be pleading that some constitutional defect had occurred in the process, in the trial process, that resulted in his habitual criminal conviction.

QUESTION: And if he raises any federal constitutional issue at all, he can have habeas to test those earlier convictions?

MR. EIKENBERRY: Yes, Your Honor, providing he's exhausted his remedies in state court.

QUESTION: Yes, assuming that.

MR. EIKENBERRY: Yes.

QUESTION: Well, I'm not so sure why that doesn't foreclose your argument here, then.

MR. EIKENBERRY: Let me, if I may, Your Honor, go to the sentencing standards that this Court has established in three cases because I think that might bring us to the question that's been raised here.

We agree that in reviewing a sentence which places a person in custody the court should consider prior convictions which were a factor in making that determination. The cases and common sense tell us that proper -- those are proper subjects for a sentencing court to corsider.

I indicatec that the Tucker case before sets out the general rule, which is that in the absence of circumstances such as Jones or Hensley or Tucker then a trial judge, and I'm quoting from Tucker, "A trial judge generally has wide discretion in determining what sentence to impose. Before making that determination, a judge may appropriately conduct an inquiry, broad in scope, largely unlimited as to the kind of information it may consider or the source from which it may come."

And three Justices of this Court, in a dissenting opinion in Schaal versus Martin not long ago, relied on that language and phrased it a little differently. "The Constitutional limitations upon the

kinds of factors that may be relied on in making such decisions are significantly looser than those decisionmaking processes that abridge the liberty of presumptively innocent persons."

QUESTION: Mr. Eikenberry, if you are answering Judge Kennedy's question, go ahead and then I have a question for you.

MR. EIKENBERRY: Well, what I'm attempting -- the reason for reading that quotation was simply to indicate the general rule and indicate that there is -- that a sentencing court has a looser set of restrictions, if you will, on what factors may be considered in arriving at a sentence, but, conversely, when this Court is reviewing that process we must recognize that that court had a wide discretion and therefore the only thing we would look at at the '58 conviction, with an expired sentence, is is it valid on its face.

QUESTION: General Eikenberry, the Court of Appeals said, on page A3 of the appendix, its opinion that the respondent's conviction was lengthened by two and one-half years because of his prior convictions. Now is that consistent with what you said earlier, that we just can't say what happened in 1978?

MR. EIKENBERRY: A couple of important things,

Your Honor. First, the Ninth Circuit misapplied the law. It is referring there to a statute that is no longer authority and simply didn't apply the law that was in effect.

But it doesn't make much difference to us in arguing the case to the Court. We can acknowledge, will acknowledge that there may -- the betting is that there will be an effect from that 1958 conviction.

QUESTION: And it was specifically taken into account in some way by the judge who sentenced in 1978, so that the '78 sentence was longer by reason of the '58 conviction?

MR. EIKENBERRY: We cannot know that, Your Honor.

QUESTION: Well, we are judging the case that way, aren't we?

QUESTION: We have to take that. We're not going to go into Washington law.

MR. EIKENBERRY: We'll accept that. I would only like to draw this distinction, Your Honor, that you'll soon hear references to the sentencing grid that will be used by the parole board, and that will show you, that will show the Court that certain points are given because of the 1958 conviction.

QUESTION: Well, General Eikenberry, if I

understand it correctly, we don't yet know how long this defendant will have to serve in the 1978 conviction in state court; is that right?

MR. EIKENBERRY: Absolutely correct, Your Honor.

QUESTION: Because under Washington law a board, a state board, will make that determination at such time as he finally is turned over to state authorities; is that correct?

MR. EIKENBERRY: That's absolutely correct, Your Honor.

QUESTION: And under the new Washington law that would be applied they apply a grid which includes giving factors or points for prior convictions, including the '58 conviction; is that correct?

MR. EIKENBERRY: That is correct, Your Honor.

QUESTION: And you concede that if the board were to apply that grid as it is designed it would lengthen the sentence he otherwise would serve on the '78 conviction?

MR. EIKENBERRY: That, too, is correct, Your Honor.

QUESTION: Okay.

MR. EIKENBERRY: With one addition, if I may, and that is that that will then establish the median

from which the board may deviate in any direction they wish, according to what they see as mitigating or aggravating circumstances completely different from --

QUESTION: Right. But if you have a higher median from which you deviate, the deviation will -- and if the deviation is the same, you'll end up higher?

MR. EIKENBERRY: That's correct, Your Honor.

QUESTION: So we can assume that this is going to have an effect on his sentence?

MR. EIKENBERRY: For the purpose of this Court's decision, absolutely, yes, Your Honor.

QUESTION: May I then ask you another question? Supposing we're five or six years down the road and we're at a point at which the parole board reviewing his application for parole would say to itself, well, he's done everything and he would now get out except for one thing, because of that 1958 conviction back, it's now 40 years ago or 50 years ago. That's the one thing that's preventing his release.

And we know that's an unconstitutional conviction. Why is he not then within the plain language of 2254(a) being held in custody in violation of the Constitution of the United States?

MR. EIKENBERRY: If, as the Court said, we know that he has an unconstitutional conviction, then

certainly in that narrow scope of review --

QUESTION: And then would a federal court have jurisdiction to correct that constitutional error five years in the future?

MR. EIKENBERRY: This Court would certainly grant relief and the Court, the District Court would certainly grant relief.

QUESTION: Well, what are you arguing here?

MR. EIKENBERRY: What I'm arguing is that we don't have habeas corpus custody jurisdiction that will grant the broad kind of relief to 1958 in the same way that we do for the '78.

QUESTION: Are you just arguing scope of review rather than jurisdiction?

MR. EIKENBERRY: No. We must --

QUESTION: You're saying we don't know it here. Isn't that your point -- that here we don't know it? You say if we know it's unconstitutional, by which you mean if it's unconstitutional on its face or if it's been set aside by some court, then you can get the habeas?

MR. EIKENBERRY: Yes, Your Honor.

QUESTION: But if we don't know it, a federal court cannot inquire into it?

MR. EIKENBERRY: That is correct, Your Honor.

And I would submit there's no reason to think that it is an unconstitutional conviction at all. In fact, to the contrary.

QUESTION: That's always true. Very rarely do you admit it. But I'm just trying to get I don't understand why the federal court has power in one case and does not have power in the other case. If you have to argue about the constitutionality, there's no jurisdiction. If it's plain on its face, there is jurisdiction.

MR. EIKENBERRY: Let's put it this way, Your Honor. So far as Mr. Cook is concerned and whether there's an additional two and a half years, it makes little difference. What is important is that where we have a 1958 conviction, the sentence expired, we don't think it's appropriate to read the section 2254 to say that he is now in custody pursuant to --

QUESTION: That isn't the language of the statute. It doesn't say in custody pursuant to. It says he's in custody in violation of the Constitution. That's what the language of the statute is.

MR. EIKENBERRY: The previous language, Your Honors, is "in custody pursuant to".

QUESTION: Well, he is in custody pursuant to the judgment of a state court. That we've gotten over.

The detainer takes care of that.

MR. EIKENBERRY: But not for the '58 conviction, Your Honor.

QUESTION: No. But he is in custody. He satisfied that language if he's in custody pursuant to an outstanding conviction. And then the question is what questions may he raise in a habeas corpus, and he raises the question that his custody does violate the Constitution. It may be because of an old conviction or it may be because of all sorts of other errors.

MR. EIKENBERRY: And the sequence of steps, Your Honor, is that he has been -- he is in custody pursuant to the 1978 sentence.

QUESTION: Correct.

MR. EIKENBERRY: And any review of the 1958 conviction, which has an expired sentence, may only be to look to see if it's invalid on its face.

QUESTION: If he's in custody in violation of the Constitution.

QUESTION: But the question is, why is that? And just to say that he's not in custody doesn't answer it. It would seem to me the question -- the answer is that in one case it's invalid on its face and therefore it's a federal violation to hold him based on a facially invalid conviction.

MR. EIKENBERRY: And the point I've been attempting to make, Your Honor, is that there are different standards of review depending on whether we're challenging a conviction or whether we're challenging a sentence. And that's the distinction we've been trying to draw.

If I may, I would reserve the balance of my time for rebuttal.

QUESTION: Very well, General Eikenberry.

Mr. Midgley, we'll hear now from you.

ORAL ARGUMENT OF JOHN B. MIDGLEY, ESQ.

ON BEHALF OF THE RESPONDENT

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

Mark Edwin Cook's habeas petition is not a request to have this Court rule that he is in custody on the 1958 conviction. Mr. Cook is in custody; we know that because he is in prison. He is in prison based on both the federal and state convictions that Mr. Eikenberry has discussed.

QUESTION: Is that strictly accurate, to say that he is presently in prison by virtue of the state sentence as well as the federal sentence?

MR. MIDGLEY: Mr. Chief Justice, I believe it is correct under a combination of both Peyton versus

Rowe and Braden versus the Thirtieth Judicial District cases. Under Peyton, Peyton I think uses the word "aggregate" of the sentence, that he is in custody on the aggregate, so he is certainly in prison on the aggregate of them.

And I believe that Braden deals with the question of where the petition may be brought on the state conviction.

QUESTION: He may be in custody under our cases pursuant to the Washington, but I think you said he was in prison presently pursuant to the Washington conviction. I thought that just wasn't factually correct.

MR. MIDGLEY: Well, he is in -- that's right. He's in prison --

QUESTION: For the federal sentence.

MR. MIDGLEY: On the aggregate. He's now in the federal sentence, that's correct, and will serve the Washington sentence consecutively. I didn't mean to suggest that he was in a Washington prison at this point because he's not.

But the jurisdictional question of where he may bring the habeas petition I believe that if you look at both Peyton versus Rowe and Braden he is allowed to attack the future sentence, obviously, under Peyton, and

under Braden I think that he could have brought it in California, I believe, under Braden.

But I think that Braden implies that you can also bring it in the judicial district where it was obtained.

If not, then I would suggest that the only relief in this case would be to vacate the petition and simply state that it be refiled in California. We don't believe that is necessary under the Braden case, but that would be the situation.

Now, Mr. Cook is simply claiming that the 1958 conviction lengthens the amount of time he will have to spend in prison on his 1978 state sentence, and this, as this Court said in Preiser versus Rodriguez, where you're talking about the duration of the actual physical confinement that you will have to spend in prison, is within the core of federal habeas corpus.

QUESTION: And then I take it the same would be true if a judge in sentencing, without reference to any specific enhancement provisions in a statute, simply said I have looked at your record and I take into account the fact that you've been convicted two or three previous times and I'm going to take that into account.

MR. MIDGLEY: That's not this case, because in this case state statutes require that a particular

amount of time be added to his prison term.

QUESTION: But under your argument wouldn't the same follow?

MR. MIDGLEY: It would probably follow and, frankly, I think that's the Tucker case. I think that's the case of when a --

QUESTION: Well, but in Tucker the conviction was invalid on its face.

MR. MIDGLEY: Well, I believe, Justice Kennedy, that in Tucker what had happened is Mr. Tucker had gotten another court, a California court, to rule his Louisiana and Florida prior convictions unconstitutional and refused to use them for enhancement of a California conviction, and in Tucker there's a footnote where the Court said that there is still an issue regarding the third conviction.

So I don't -- and my recollection of Tucker is not that they were invalid on their face but, rather, there had been proceedings in which the validity had been discussed.

QUESTION: But it's certainly not a holding that a federal habeas action lies in order to inquire into the validity of any conviction that the court might have made reference to in sentencing.

MR. MIDGLEY: It is not a holding of Tucker,

because Tucker, although Tucker is a 2255 case, Tucker does not hold that. But Tucker and Burgett make the holdings on which all of the circuits, virtually, have made the decision that it's a logical -- the logical implication of Tucker and Burgett that enhancing prior convictions may be inquired into in federal habeas corpus.

For the last 20 or 25 years, this is what the circuits have held. It is simply a logical implication of these cases.

QUESTION: Mr. Midgley, your client is not being punished for the 1958 act. You concede that. I mean, we do have a double jeopardy clause. He's being punished for his latest crime and not for the '58 crime, correct?

I mean, the fact that you use that as an enhancement of his sentence is quite separate from whether you are punishing him again for the '58 crime.

MR. MIDGLEY: I wouldn't argue that in an double jeopardy sense he's being repunished for the '58 crime, but he is in -- he will be in state prison pursuant to the '78 judgment.

QUESTION: That's right.

MR. MIDGLEY: And the '58 lengthens the term.

QUESTION: And in deciding how much he should

be punished for the '78 crime the states take account of all sorts of things, not just prior crimes, but maybe the degree of remorse he has shown, which may be evidenced by various things, and they are really -- how dangerous he will be if let out. And those are all probabilities, aren't they?

I mean, you're guessing as to how dangerous it'll be. Now why isn't it reasonable for the state to say when there are outstanding prior convictions it is enormously probable that this fellow is going to be very much more dangerous. Should we let him out?

That would explain why General Eikenberry can say when those prior convictions are invalid on their face or have been set aside then they can be reviewed on federal habeas because then it is as a matter of due process, not reasonable to rely on those probabilities. The probability doesn't exist.

But isn't all sentencing a matter of probabilities, and isn't it an overwhelming probability that when there's a sentence on the books that hasn't been set aside, he hasn't challenged it in habeas, he's likely to be a more dangerous fellow?

MR. MIDGLEY: Justice Scalia, there are a number of answers to your question. First of all, your question presumes that Mr. Cook knew that there was

something to challenge. Now the only record we have in this case is that in 1977, when they tried to impose the habitual criminal proceedings on him, the state brought out these documents which they conceded did not show that there had been a competency hearing.

That was the only point we know in this record that Mr. Cock himself may have had some idea that there was a problem.

QUESTION: Why does my question assume that he knew that he had something to challenge?

MR. MIDGLEY: It assumes that there would have been an attack earlier.

QUESTION: No, it doesn't. All my question assumes is that in the overwhelming majority of cases the fellow who has an outstanding conviction on his record is going to be more dangerous than someone who doesn't. That's all it assumes, and that is an overwhelming probability, isn't it?

MR. MIDGLEY: The states -- yes. I would not concede that it's an overwhelming probability. I think the states are constitutionally permitted to use prior convictions to add time, but they are not constitutionally permitted to use constitutionally-invalid prior convictions to add time.

QUESTION: But of course that isn't the

question in this case. The question is whether or not it follows from that that any time reference is made to a prior conviction that there is automatically federal habeas review to reopen those convictions based on an alleged infirmity.

MR. MIDGLEY: Well, that's not the issue in this case, because the issue in this case is that the state statutes require that a particular amount of time be added under those. It is not, as Justice Scalia was questioning me about, it is not a question of the state looking at a number of different factors.

The parole board in this case is required --

QUESTION: But what's the constitutional difference between the two?

MR. MIDGLEY: The constitutional difference between the two is two. First of all, that, as this Court said in Burgett and Tucker, the state may not enhance sentence based on constitutionally-infirm convictions because it renews the constitutional violation. And it renews the constitutional violation by adding prison time based on invalic constitutionally-invalid prior convictions.

QUESTION: We're back where we started. Your whole premise is that it's invalid on its face.

MR. MIDGLEY: No, that's not my premise.

QUESTION: That's the whole question.

MR. MIDGLEY: That's not my premise, that it's invalid on its face. Washington --

QUESTION: Except that that's what happened in Tucker.

MR. MIDGLEY: Well, the convictions were not invalid on their face in Tucker at the time sentence was imposed. The California -- in my recollection, the California -- Tucker is a 2255. He filed the 2255 long after senterce and said a court has invalidated the prior convictions; now I don't think they're valid. And the federal court, the Ninth Circuit, said then they can't be considered.

And this Court said the question of his third prior conviction is still open.

And Washington law requires that the underlying convictions be constitutional. It does not require, under the Ammons and the Bush cases that we've cited in the briefs -- and this is a key point -- does not require that the state affirmatively prove the constitutional validity in the sentencing proceeding. But it does presume their constitutionality because --

QUESTION: Well, we didn't certiorarilly take this case to pass on some peculiarity of Washington law.

MR. MIDGLEY: I understand that. But the

important point is that Washington does presume the constitutionality of the convictions to support its sentence. And it directs people to go to their collateral remedies and if then they are declared invalid for this use, which is all Mr. Cook is claiming -- he is not claiming he is in prison on the 1958.

QUESTION: So supposing that we get to the parole board situation after your client has served his federal sentence and suppose the parole statute simply says that the parole board may take into consideration, among a number of other factors, previous convictions.

Would you say that that would be enough to allow him to challenge the '58 conviction?

MR. MIDGLEY: I would -- first of all, that isn't the case that's before us.

QUESTION: But we need to probe a little bit to find out what you're getting and what we're getting at.

MR. MIDGLEY: I think that Tucker says that any consideration -- that Tucker implies, if you will, that any consideration of invalid priors is -- would give grounds for collateral relief. But that is not necessary -- it is not necessary to go that far to decide this case, because in this case mandatory state statutes require that a certain amount of time be added.

QUESTION: So that if the claim as to the '58 conviction were that his Miranda rights were violated, that could be litigated in

MR. MIDGLEY: I think that that is -- the state has brought this up on a custody question and I think that is a substantive constitutional question which is not before the Court because whether a particular kind of claim can be brought is not a custody issue; it is a question of substantive constitutional law about whether, for example, an uncounseled conviction -- I think Tucker and Burgett talk specifically about uncounseled convictions, and I think that the state essentially is asking this Court to decide in advance a whole array of substantive constitutional questions about which kinds of convictions.

Are they saying that you can't attack a prior where there wasn't a trial, that that couldn't violate due process in any circumstance?

QUESTION: Well, do you say that you can attack a prior under these circumstances when there was simply a violation of the Miranda rule?

MR. MIDGLEY: I think that, to address the issue that's before the Court in this case, I think there would be custody to make that claim, and it would

then be a substantive constitutional question whether a Miranda violation, using a conviction which was allegedly invalid under a Miranda violation, is itself a constitutional violation.

QUESTION: Yes. The parties may be limited to the questions presented, but the Justices aren't.

MR. MIDGLEY: I understand that.

QUESTION: So what's your answer?

MR. MIDGLEY: My answer is I think that that could be determined in habeas proceedings.

QUESTION: So that would be something that could be litigated in a habeas proceeding?

MR. MIDGLEY: Yes, it could be. Yes, that is my answer.

QUESTION: Well, the Chief Justice read a sentence out of the Court of Appeals opinion about two and a half years.

MR. MIDGLEY: Yes.

QUESTION: Is that statement correct? I mean, the Court of Appeals certainly thought that the '78 sentence had been enhanced.

MR. MIDGLEY: Yes, it has been enhanced in the sense that there has been a finding by the trial court that he was armed with both what's called under Washington law a deadly weapon and a firearm. Now the

effect of those will be to put him within enhancement statutes that the parole board applies, and the enhancement statutes are what we call in the briefs mandatory minimum terms. They are like a special parole board.

QUESTION: So that statement is correct by the Court of Appeals?

MR. MIDGLEY: The statement is correct that it is available for use when the board actually sets the term.

QUESTION: Well, it says it was lengthened. Now technically he hasn't -- that's never been determined. So it isn't correct, technically.

MR. MIDGLEY: It's not correct that it was lengthened, but it is very certain, because of the provisions of state law, that it will be. I think again this goes back to Peyton versus Rowe, the state saying we don't really know what's going to happen.

Our showing, on pages four to nine of our brief, is we do know that the '58 conviction is going to have a specific lengthening effect.

QUESTION: Well, I think General Eikenberry conceded that it will have some effect ultimately today. Do you think that, even if you're right that this challenge can be made, that some principle of

laches ought to kick in at some point so we don't get back in all these cases to impossible situations to try to determine?

MR. MIDGLEY: Justice O'Connor, there is --

QUESTION: This was 27 years ago, for goodness sakes.

MR. MIDGLEY: Yes, and there are proof problems in there, but there are proof problems on both sides. And I think that Rule 9(a) of the rules governing section 2254 cases certainly is an issue that may be available. It's not before the Court in this case.

QUESTION: So laches might properly, in some cases, be raised by the state and say, look, we've been harmed by this. We can't make this proof now.

MR. MIDGLEY: Yes, I think that's correct. And the state did raise it below but it hasn't been determined and it's not before this Court. But it's certainly an available issue in some cases. But it must meet all the other criteria, which the lower courts have upheld.

QUESTION: Because at least this defendant presumably could have made this very claim long before now, when the '58 conviction was still alive and kicking.

MR. MIDGLEY: Well, I would suggest that on

this record we don't know that and that that's one thing that the district court needs to inquire into, is he had been incarcerated in mental hospitals. We don't know what his circumstances were before.

We know that he knew in 1977, because the state tried to impose the habitual criminal enhancement on him, and at that point he did know that there was a defect. But on this record the Court doesn't know when he did know.

QUESTION: I really don't see how that fits with your theory of laches. It seems to me that if his sentence is being enhanced unconstitutionally we can really say well, we're sorry. It isn't a past harm that we're saying, well, it's too late for us to give you any recompense for this past harm, which is what usually is the situation in laches.

You know, you can't recover any more for that past harm. This is a present harm. You're telling us your client's in jail and, on the one hand, you say yes, I need immediate relief, and on the other hand say well, there can be laches. This is not the ordinary laches case.

MR. MIDGLEY: Well, I didn't mean to say that laches would necessarily keep the challenge out in every case. There are some federal circuit court cases which

suggest in this circumstance that the laches period would run when the state imposes the new sentence.

QUESTION: If your theory is correct, I don't see how laches applies in any case. He is being currently harmed by the state and he claims that's unconstitutional. I don't see how you say it's all past harm and it's now too late to complain about it. It's current harm.

MR. MIDGLEY: Well, to say that it's laches is perhaps not the right use of the term. I think Rule 9(a), which is based partly on laches, may be applicable in some cases, and that's all I was conceding or saying. I don't think that you can, particularly on this record, I don't think that you can say that the 27-year delay is automatically attributable to my client, and I'm not saying that you could start the clock right at the beginning.

It would depend on the circumstances and it would depend on the circumstances based on when the present harm began.

QUESTION: Mr. Midgley, let me ask you this. It seems to me that we sentence all the time on the basis of probabilities. It is the case, is it not, that if your client had not been convicted for these prior criminal acts but there was just some evidence on which

he was arrested and then released that that could be introduced in sentencing and a sentencing judge or jury could consider evidence of prior criminal acts as to which there had not been convictions in sentencing. Right?

MR. MIDGLEY: A judge in sentencing --

QUESTION: And that would have been okay and had the enhancement been based on that you could keep him in jail. But you're telling us that since he was convicted you can't keep him in jail unless you go back and prove the validity of that conviction. That seems to me a very strange, very strange system.

If he hasn't been convicted, you can keep him, but if he has been you can't.

MR. MIDGLEY: Well, the problem is that the parole board is not now free to add that time on that grid based on mere arrest. There must be the fact of conviction, and under Washington law the conviction must have been constitutionally obtained for that --

QUESTION: Well, I'm not concerned about Washington. I'm concerned about any sentencing judge. Is it not the law that a sentencing judge could, on the basis of unconvicted, evidence of crimes for which the defendant has not yet been convicted but evidence of them, could give him a longer sentence, which which the

parole board would then have to make its adjustments?

I think the answer is yes. But you're telling us that if he does it on the basis of a conviction then you have to prove the conviction was valid.

MR. MIDGLEY: The answer is yes, that the judge could consider that in sentencing, but it has no effect on the parole board because the judge has only set that maximum sentence. The actual duration of confinement, which is the words that's used in Preiser versus Rodriguez, as being at the core of habeas corpus, duration of confinement is set by the board, and the board has to look at that conviction in order to set that time.

QUESTION: But don't you start with the sentence that's been imposed?

MR. MIDGLEY: No, you do not.

QUESTION: You don't start with the sentence imposed?

MR. MIDGLEY: The board can't go over the maximum on this grid, but the board now must start with the two-factor grid -- the seriousness of the crime and prior record. So the maximum sentence has no impact of constraining the board in that sense.

What does have the impact of constraining the board is the mandatory state statute which says if he

has the 1958 conviction you must give him more time in prison.

QUESTION: Well, I think that shows that the discrepancy does not exist under this state sentencing scheme, but still as a theoretical matter it seems to me you are proposing something that looks very strange in another context.

Washington could have put on its grid evidence of prior crimes for which the defendant has not been convicted. It simply has not happened to do so, but it could have done that, and that would have been constitutional under our cases. Right? And you wouldn't have to prove those crimes; you just have to say considerable evidence of crimes.

MR. MIDGLEY: I think there is certainly a question about how they come to that evidence. There's a due process question about how that's presented.

QUESTION: Sure.

MR. MIDGLEY: And about what the quality of that evidence is. And that's part of what this Court has said and all the circuits in playing out the implications of this Court's decision, this is not something I'm proposing. This is something the circuits have been doing for many years, and this is not something we're proposing as a great expansion of habeas

corpus jurisdiction because it's been being done.

But the question is the reliability, the constitutional reliability of that information, and this court has said that those prior convictions which are unconstitutional are not, at least as to counsel -- and, we would suggest, as to the kind of defect we have in this case where the defendant claims he was incompetent at the time of the trial -- is a fundamental defect which casts doubt on the reliability of the conviction.

And that's unreliable information. That goes all the way back to Townsend versus Burke. You can't sentence on the basis of a due process violation. You sentence on the basis of material, untrue information. And this Court, as recently as Johnson versus Mississippi, talked again about not having that sort of unreliable information in sentencing.

And that's what these cases are based on, and that's the basis of the constitutional violation that we're claiming. And the state again is going back and trying to get this Court to determine those substantive questions, and that is not, we submit, the question before this Court.

He is in custody. He's claiming that his custody was lengthened by an unconstitutional prior conviction, and habeas corpus --

QUESTION: Are you saying that it's open to the state, then, on remand to argue that habeas doesn't lie to cure -- to inquire into this particular defect?

MR. MIDGLEY: I think that that's a question, a legitimate question, in any habeas corpus cases. Whether this sort of defect is at issue is a constitutional violation or --

QUESTION: Well, there's a constitutional requirement for a competency hearing, isn't there?

MR. MIDGLEY: Yes, there is. In this case I don't think it's open to them because the defect is so fundamental. I'll give you an example of a case that would raise an issue, and that is a Stone versus Powell question.

It seems to me that a Fourth Amendment claim you run into problems with Stone versus Powell. As to competency, you don't have those problems; therefore, I think the constitutional issue is open to him.

But I really -- that's a substantive constitutional question or another question of habeas corpus. It's not a custody question.

QUESTION: And you say that for years the circuits have been, and the district courts have been holding habeas hearings on these kinds of questions?

MR. MIDGLEY: They have, and we've cited cases

in our brief and both of the amicus briefs have cited circuit cases from as far back, I believe, as the '60s, following, but at least from the early '70s following this Court's lead in Burgett and Tucker, and looking at priors which do make these kinds of enhancements.

QUESTION: Of course, both Burgett and Tucker were uncounseled.

MR. MIDGLEY: Yes, that's correct.

QUESTION: This Court has never gone beyond that.

MR. MIDGLEY: This Court has not gone beyond that. This Court did say in Burgett that prior unconstitutional convictions should not be used to enhance sentence, but they were dealing with, the Court was certainly dealing with uncounseled convictions. And the circuits have all applied it, certainly, to that, to that issue.

But that's correct. Burgett and Tucker did not go beyond the issue of counsel.

Finally, I'd like to add that there is a counsel issue in this case, and that is simply that of course if a person's incompetent he doesn't have the ability to assist counsel. Obviously there are also issues of presence, and we're saying essentially that this is such a fundamental defect that there's no

question that he should be able to raise this in his federal habeas petition.

So for all the reasons that we've stated, we ask that the Ninth Circuit be affirmed because Mr. Cook is in custody, because he challenges the length, the duration of his imprisonment as unconstitutional, and that is what section 2254 and 2241 require.

Thank you.

QUESTION: Thank you, Mr. Midgley.

Mr. Eikenberry, General Eikenberry, do you have rebuttal?

REBUTTAL ARGUMENT OF KENNETH O. EIKENBERRY, ESQ.

ON BEHALF OF PETITIONER

MR. EIKENBERRY: Yes. May it please the Court:

Two points. The first point is that the 1958 conviction is valid. It has been found to be valid in Washington courts, and I suppose if we had to predict we might well make it on the competency issue even today, if it were heard out.

That is, the defense lawyer for Mr. Cook made the motion to the court to have doctors appointed. The defense lawyer presented the order to have Mr. Cook transported to the hospital. The record shows the doctors were paid and then Mr. Cook went to trial with that same lawyer. So if there's a question for Mr. Cook

to raise that were legitimate it would perhaps be as to competence of his counsel.

But we think that's all really beside the point because the conviction has been found valid on its face.

The point that we'd like to make is this is being brought 27 years after the conviction, seven years after the expiration of the sentence. We think this process would -- does undercut finality and the credibility of the system. We would encourage the Court to send the matter back with the clear expression that any challenge that may be brought is through the 1978 sentence rather than as directly against the '58 conviction.

That concludes my presentation.

CHIEF JUSTICE REHNQUIST: Thank you, General Eikenberry. The case is submitted.

CERTIFICATION

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

No. 88-357 - NORM MALENG, ETC., ET AL., Petitioners V. MARK EDWIN COOK

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BY Judy Freilicher

(REPORTER)