

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HAROLD RAY WADE, Petitioner V. UNITED STATES

CASE NO: 91-5771

PLACE: Washington, D.C.

DATE: March 23, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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HAROLD RAY WADE, :
Petitioner :
v. : No. 91-5771
UNITED STATES :
- - - - -X

Washington, D.C.
Monday, March 23, 1992

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:03 a.m.

APPEARANCES:

J. MATTHEW MARTIN, ESQ., Hillsborough, N.C.; on behalf of
the Petitioner.

ROBERT A. LONG, JR., ESQ., Assistant Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Respondent.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 91-5771, Harold Ray Wade v. United States.

5 Spectators are admonished not to talk while the
6 Court remains in session.

7 Mr. Martin.

8 ORAL ARGUMENT OF J. MATTHEW MARTIN

9 ON BEHALF OF THE PETITIONER

10 MR. MARTIN: Mr. Chief Justice, and may it
11 please the Court:

12 Good morning. The issue today before the Court
13 is whether the district judge has any authority to
14 consider a defendant's substantial assistance outside of
15 the Government's refusal to make a motion for downward
16 departure.

17 The court of appeals of the Fourth Circuit held
18 that because the statutory authority gives the prosecutor
19 sole discretion in deciding whether to file a motion for
20 downward departure for substantial assistance, that
21 neither the defendant nor the court may inquire into the
22 Government's reasons and motives, if the Government does
23 not make the motion.

24 The Government now concedes that there are
25 grounds for review by the court when a defendant makes a

1 threshold showing of un -- unconstitutional activity on
2 the part of the prosecutor.

3 We urge the Court to reverse the decision of the
4 Fourth Circuit Court of Appeals. The only uncontested
5 issues before the Court today are what -- whether the
6 scope of judicial authority includes review of claims for
7 bad faith or arbitrariness on the part of the prosecutor
8 in his decision-making process; and also, what
9 circumstance -- what the circumstances are surrounding the
10 remand in this particular case.

11 In this case --

12 QUESTION: Well, I think the Government agrees
13 that if a showing is made, it -- the judge can certainly
14 inquire into what the -- what the prosecution's reasons
15 were for not making a -- making a motion.

16 But I don't think the Government agrees that
17 showing was made here. I don't think the Government
18 agrees there should be a remand, does it?

19 MR. MARTIN: No, Your Honor, they don't. What
20 happened in this case is the district court upheld that he
21 had no authority to entertain this inquiry, whatsoever.

22 QUESTION: Well, did you make any sort of a
23 proffer?

24 MR. MARTIN: I did make a brief proffer at the
25 trial court --

1 QUESTION: And would -- what did the proffer
2 consist of?

3 MR. MARTIN: Basically, the proffer consisted of
4 a recitation of what Mr. Wade's assistance was up to that
5 point.

6 QUESTION: Well, did it consist of any showings,
7 a prima facie showing that the Government was denying Mr.
8 Wade his constitutional rights?

9 MR. MARTIN: Not at that time, Mr. Chief
10 Justice. But the judge would not let me put on any
11 evidence --

12 QUESTION: Well, but putting on evidence is
13 different from a proffer. I think a judge is entitled to
14 first say you make your proffer, and then I'll see whether
15 I'll let you put on evidence.

16 And if your proffer was insufficient, he was
17 entitled to say, I'm not going to hear you.

18 MR. MARTIN: I believe that would be correct.
19 But what happened in this case was the reverse. If you'd
20 look at the joint appendix, and you can see that what
21 Judge Tilley, the district court judge did, was deny my
22 request -- not once, actually, but twice -- before he
23 allowed me to make the proffer.

24 So actually, he had ruled on this before he said
25 you may state -- you may make a statement.

1 QUESTION: Well, but there can be good reasons
2 and bad reasons for denying a particular motion. And if
3 your proffer does not show that the reason must have been
4 bad, you're not in good shape; as opposed to whether your
5 proffer -- your proffer, if believed, would show that the
6 reason would have been bad.

7 MR. MARTIN: Well, the -- at the trial court,
8 the trial judge did not even think he had the authority to
9 get to the point of making a proffer where he could hear
10 any evidence. He says: Well, I believe I'm going to --

11 QUESTION: What page are you on?

12 MR. MARTIN: On page 9 of the joint appendix,
13 the court says, and I quote: Well, I believe I'm going to
14 let you make some law with that case. Because I
15 believe -- I do not believe so. And I hold that I do not
16 have that authority. You may appeal that belief that I
17 feel that I am imposing this sentence contrary to law,
18 because I don't believe that I can depart upon your motion
19 for substantial assistance for a mandatory minimum.

20 He did not believe that he had any authority,
21 whatsoever, to entertain any kind of motion with regard to
22 this. And, indeed, the Fourth Circuit affirmed him.

23 QUESTION: Well, Mr. Martin, it is true that the
24 judge did allow you to state for the record, in the event
25 you desired to appeal, what the evidence would be.

1 MR. MARTIN: I do not disagree with that, Your
2 Honor.

3 But I was not allowed -- he would -- you can see
4 on the --

5 QUESTION: You knew you were going to lose.
6 That much is perfectly clear. But you were given the
7 opportunity to say why you thought you ought to win.

8 MR. MARTIN: Well, it was a very strange
9 sentencing proceeding. The parties in the case before us,
10 Your Honor, had raised a very similar type of request.
11 And the judge was very short. I felt like the judge was
12 going to sentence my man to the mandatory minimum, but I
13 didn't want to risk his ire.

14 The -- I guess the point --

15 QUESTION: But you did risk his ire. I mean,
16 you -- you -- you went on and stated for the record the
17 evidence. And it's on the bottom of page 10. And not a
18 single iota of that evidence has anything to do with a
19 constitutional violation.

20 MR. MARTIN: Well, I did --

21 QUESTION: You just said this defendant provided
22 a lot of assistance from the Government, they should have
23 given him a break.

24 MR. MARTIN: Well, that is true.

25 However, there is -- there is additional

1 evidence that is, frankly, just not a part of the record .
2 that is before the Court.

3 QUESTION: Well, did you try to proffer that?

4 MR. MARTIN: I did not, Your Honor. Because --

5 QUESTION: Well, that's the end of the -- I mean
6 that's as far as we can go, isn't it?

7 QUESTION: Yeah.

8 MR. MARTIN: Well, there -- there's
9 a -- you -- there's a point in here, where, on page
10 10 -- or I suppose on page 9 and 10 -- where I'm going
11 through this with the court. And I asked the court, would
12 it be appropriate for me to put on evidence? I had
13 anticipated being able to put the special agent on, so
14 that he could discuss the contact that the agent had with
15 the defendant and the inducements that were made to Mr.
16 Wade by the agents of the prosecutor, that is, the Drug
17 Enforcement Administration Agency.

18 That I was not allowed to do.

19 QUESTION: Well, are you saying that implicit in
20 your proffer is an attempt to show that the Government was
21 acting in bad faith?

22 MR. MARTIN: Well, perhaps not in my proffer,
23 itself, Justice Kennedy, but in -- at the beginning of my
24 discussion with the judge, I say it is again a question of
25 that, as opposed to the prosecutorial function. I was

1 trying to bring this up with him.

2 But he just simply refused to -- he actually
3 ruled very quickly and said --

4 QUESTION: Well, surely there are much more
5 direct ways of bringing it up with him than the language
6 you just quoted. I would say that was oblique, at best.

7 MR. MARTIN: I don't necessarily disagree with
8 that characterization, Mr. Chief Justice. But -- I
9 suppose the only way I can say that is that this is a
10 court that I'm extremely familiar with; that I practice in
11 every month; prosecutors and I are, you know, very close.

12 And so in my mind, at the time, it was a touchy
13 subject. I wanted -- and we still do -- want to have a
14 chance to make the showing that the Government now says we
15 can make.

16 QUESTION: Well, I think you better argue on the
17 record before us.

18 MR. MARTIN: Well, I'm not trying to -- I'm
19 actually not trying to get off of it.

20 What Mr. Wade would like is an opportunity to
21 make the showing that the Government now says he has to
22 make. Please remember that --

23 QUESTION: Yeah, but that -- is that why we took
24 this case? I mean didn't we take the case to determine
25 whether you were entitled to something on the record that

1 you've got?

2 MR. MARTIN: Well, the --

3 QUESTION: I mean, I think you want to make a
4 different case for us.

5 MR. MARTIN: Justice Souter, the Fourth Circuit
6 held that the district court has no authority to
7 entertain --

8 QUESTION: All right, and we're now at the point
9 where it is conceded that there is some authority. And
10 the question before us is whether your proffer entitles
11 you to some kind of relief, either given the authority
12 that has been conceded, or given a broader authority if we
13 should hold that.

14 And isn't the sort of immediate question before
15 us, if you concede that the proper standard is that the
16 Court can look behind the refusal to move, if the refusal
17 amounts to a constitutional violation, then isn't the
18 question before us whether you have -- have proffered a
19 basis to look behind it? If all you say is, we cooperated
20 and they haven't moved to reduce, isn't that the exact
21 question in front of us?

22 MR. MARTIN: I don't believe so. I believe the
23 question before the Court is did the district court have
24 any authority -- if the parties now agree that the
25 district court did have the authority, I think the

1 question then is, isn't it appropriate to send the case
2 back to the district court and say, district court
3 judge --

4 QUESTION: Well, if you had not been allowed to
5 make a proffer of your evidence, you know, I -- I would
6 probably agree with you. But you were made -- you were
7 allowed to do it.

8 And so far as I know, the only thing that you
9 proffered, in effect, was that your client had
10 agree -- your client had cooperated, there had been no
11 plea agreement detailing what his consequences would be,
12 and the Government has simply refused to move for a
13 downward -- move for a reduction.

14 In point of fact, I don't think you have
15 suggested to us that you really have anything more to
16 proffer. A minute ago you said you weren't claiming bad
17 faith.

18 So isn't it the case -- given the fact that you
19 were allowed to make your proffer -- isn't it the case
20 that the only issue we can decide is whether a cooperation
21 and a refusal are sufficient to get you to an evidentiary
22 hearing?

23 MR. MARTIN: I don't believe so. Because
24 what -- what is before the Court is the decision of the
25 court of appeals, which really doesn't address this issue.

1 It just says no authority whatsoever.

2 I may have misspoke. I do believe we do have an
3 allegation of bad faith. I agree with you that it is not
4 in my proffer. And I admit that that's a problem.

5 QUESTION: Well, does -- is -- I don't think we
6 should go outside of the record, but let's be improper for
7 a moment.

8 Are you claiming -- are you claiming that, in
9 fact, there was an agreement that was broken and that's
10 what the bad faith consists of? That you did have a plea
11 agreement?

12 MR. MARTIN: No, sir, not an agreement
13 between -- no, Your Honor, not an agreement between the
14 prosecutor and myself, but agreements made between agents
15 of the prosecutor and the uncounseled defendant on the
16 night he was arrested. That is what I believe. That by
17 affidavit, I could show evidence of it.

18 QUESTION: Well, why didn't you claim that when
19 you were in front of the court?

20 MR. MARTIN: Well, I had hoped to be able to
21 call a special agent --

22 QUESTION: No, but I mean you wanted to call
23 witnesses. We understand that. The court wouldn't let
24 you do it. Why didn't you say, Your Honor, we had an
25 agreement. And they're breaking it. Why didn't you say

1 that?

2 MR. MARTIN: Your Honor, the only thing I can do
3 to explain that to you is to tell you that I felt very
4 pressured by the judge to move on; he was giving me clear
5 signals that he -- what sentence he was going to impose,
6 that he was going to impose the minimum; we had already
7 been -- I don't really want to go too far out of the
8 record -- but we had --

9 QUESTION: Right, and we shouldn't. I think I
10 understand your position.

11 Let me just ask a final question.

12 If we decide the case on the record before us,
13 isn't the only issue before us whether cooperation,
14 combined with no Government motion to reduce, gets you to
15 an evidentiary hearing?

16 MR. MARTIN: I do not --

17 QUESTION: Isn't that the only issue we could
18 decide on this record?

19 MR. MARTIN: I do not believe so.

20 I believe that the issue before the Court is
21 whether if -- if authority exists, whether the case should
22 be remanded for the defendant to make -- to have an
23 opportunity to make a threshold showing. I'm not
24 suggesting that the case, on remand, could proceed
25 directly to some discovery-laden adversarial proceeding.

1 QUESTION: Well, let me rephrase, if I
2 may -- and perhaps Justice Souter won't regard it as a
3 rephrasing.

4 Isn't the question whether the proffer you made
5 is -- would have been sufficient if evidence to back it up
6 were produced to obtain relief?

7 MR. MARTIN: I suppose that it could be looked
8 at that way. But I think the flip side of the coin is, is
9 that at the time, this judge was aware of precedent in the
10 Fourth Circuit which was against me, frankly. The -- with
11 that in mind, I believe that really the question is,
12 should the case be remanded?

13 QUESTION: Well, you've answered -- you've said
14 remand, remand, remand. We have asked you specific
15 questions, and all you -- you don't come up, it seems to
16 me, with any justification. All you say is that there
17 should be a remand.

18 MR. MARTIN: Well --

19 QUESTION: You know, we're not enlarging the
20 record here. We're not interested in what went through
21 your mind that isn't on the record.

22 MR. MARTIN: Your Honor, the authority of the
23 judge was foremost in his mind. It's clear from the long
24 colloquies that we had. Assuming that he has
25 authority -- I suggest to you that that's appropriate -- I

1 admit to you that, and I concede that there are problems
2 with the proffer that I made on Mr. Wade's behalf at the
3 time.

4 However, and I stress to you again, this
5 occurred after the judge had already ruled; after he had
6 . already basically cut me off.

7 QUESTION: I think we've probably spent enough
8 time on this particular aspect, but why don't you go on to
9 the rest of your argument, Mr. --

10 MR. MARTIN: Another question that remains is
11 whether the scope of review in these circumstances would
12 include the concepts of bad faith or arbitrariness, those
13 motivations on the part of the prosecutor. The Government
14 does not agree with us with regard to that.

15 I suggest to the Court that that is an
16 appropriate scope of review as well, in these cases.

17 QUESTION: Do you take the position that
18 arbitrariness is claimed, if you simply allege that there
19 has been cooperation and a refusal on the part of the
20 Government to move for a downward reduction?

21 MR. MARTIN: No, Your Honor, we do not.

22 QUESTION: Okay, what more do you have?

23 MR. MARTIN: I think what you need is a
24 motivation on the part of the prosecutor that is not
25 related to a governmental interest.

1 QUESTION: Okay. Well, let's be practical for a
2 minute.

3 Are you claiming that you can raise the issue
4 simply by a naked allegation that the Government
5 was -- was, in fact, or the prosecutor was, in fact,
6 motivated by -- by some objective unrelated to a proper
7 governmental function?

8 MR. MARTIN: No, Your Honor, I believe that
9 cross threshold showing that the Government agrees now
10 must be made, that there must be evidence which satisfies
11 the court that these conditions exist, by way of a
12 supposed proffer, or by way of affidavits.

13 I'm not suggesting that a defendant can walk
14 into the courtroom and call the prosecutor to the witness
15 stand, and then begin essentially cross-examining him.

16 QUESTION: You say these conditions exist. I'm
17 not sure what you mean by these conditions.

18 I mean, arbitrariness is -- is -- is -- a word
19 we use to describe any basis for reversing an agency. If
20 the agency hasn't acted reasonably -- is that what you
21 mean? If the prosecutor's refusal to grant a reduction or
22 to ask for a reduction is unreasonable, is that enough?

23 MR. MARTIN: If the unreasonableness rises to
24 the level of -- of denying the defendant his -- his
25 fundamental rights at sentencing, the rights --

1 QUESTION: Well, but that's not very helpful. I
2 mean --

3 MR. MARTIN: Well, I --

4 QUESTION: If we say it does, it does. It's
5 just unreasonable. It's just unreasonable. This guy's
6 been a lot of help, and the prosecutor -- he's not denying
7 it because of the defendant's race; he's not denying it
8 because the defendant's sister jilted him -- he just
9 unreasonably denies it. It's terribly unreasonable. The
10 fellow was a lot of help.

11 MR. MARTIN: And I believe that that's basically
12 correct. I mean, it's almost --

13 QUESTION: What do you mean it's correct?
14 That's a basis for overturning it. You want to be able to
15 come in and say it's just terribly unreasonable.

16 MR. MARTIN: Well, it would be unreasonableness
17 coupled with -- with not just -- not just, you treated
18 this defendant this way, and you treated this defendant
19 the other way. I don't -- I don't -- I just don't believe
20 a defendant can make it on that.

21 What I think we're talking about is a very
22 narrow, small number of cases.

23 QUESTION: How do you describe them? What do
24 you want -- really unreasonable, underscore really? I
25 mean I can tell -- you know, if you say it has to be a

1. constitutional violation, it has to be done because of his
2 race, for example. I mean that narrows the class to
3 something I can, you know, sink my teeth into. But just
4 to come up and say arbitrary -- anything's arbitrary.

5 MR. MARTIN: Well, or bad faith.

6 QUESTION: What's that? What is bad faith?
7 What would you say?

8 MR. MARTIN: Well, that's --

9 QUESTION: I mean is -- they're so wrong,
10 they're obviously in bad faith?

11 MR. MARTIN: I -- I think that's -- it's almost
12 like a sort of a sniff test, Your Honor, that the
13 district --

14 QUESTION: You know it when you see it?

15 (Laughter.)

16 MR. MARTIN: I believe so. The district judges
17 in this country can -- are -- are more than adequately
18 equipped to tell when someone has got enough to cross the
19 Rubicon, so to speak.

20 QUESTION: Well, what if we -- what if we said
21 that, well, the court of appeals is obviously wrong if it
22 said that the Government's -- the Government's decision is
23 never reviewable; and we said it's reviewable if there's
24 a -- if there's a con -- if the Government violated a
25 constitutional -- it looks like the Government violated a

1 constitutional right.

2 But we went no farther, and said but not for any
3 other reason. You don't claim that there's any
4 constitutional violation in this case. You made no claim
5 of it, and you don't claim now, I take it, that there
6 was -- that the prosecutor was violating the Constitution
7 in refusing this motion?

8 MR. MARTIN: What we --

9 QUESTION: Do you or not?

10 MR. MARTIN: Based upon the record before you, I
11 have not.

12 QUESTION: Well --

13 MR. MARTIN: And I admit that. What we -- what
14 we would like is the opportunity to go to the district
15 court and make the showing the the Government now says, is
16 now agreeing, that a defendant can make.

17 QUESTION: Well, I take it from your brief you'd
18 go even further.

19 Suppose there's a good-faith disagreement as to
20 whether there's been substantial cooperation. You think
21 there has been; the Government thinks there has not been.

22 Is it your position that you're entitled to a
23 hearing on that dispute?

24 MR. MARTIN: No, Your Honor, I don't believe so.
25 Because I believe that even to get to the point of

1 questioning the Government's motives, a defendant must
2 establish, as I believe we did in this case, must
3 establish that the assistance that the defendant rendered
4 was substantial.

5 QUESTION: Well, suppose the Government is just
6 plain wrong. There's been substantial cooperation but the
7 Government just is wrong because it characterizes it as
8 insubstantial. So long as the Government's in good faith,
9 in your view there's still -- there's no hearing?

10 I thought your position was that you're always
11 entitled to show that the Government has just made a
12 determination that's factually incorrect.

13 MR. MARTIN: Well --

14 QUESTION: Is that your position or isn't it? I
15 don't want to talk you into something you don't want to
16 argue.

17 MR. MARTIN: It's -- it's --

18 QUESTION: That's the way I read your brief.

19 MR. MARTIN: That is really not our position.

20 Our position is is that the first thing the
21 defendant must do is have performed substantial assistance
22 that is agreed upon as substantial. The court of appeals
23 found that Mr. Wade's assistance in this case was of
24 val -- I think the quote is of valuable assistance to the
25 Government. I don't believe that the Government has ever

1 disagreed that what Mr. Wade, the defense -- the
2 petitioner did --

3 QUESTION: Well, isn't it your position that
4 that's all you need?

5 MR. MARTIN: Well, no, I think there needs to be
6 one more step beyond that. I do not suggest to the Court
7 that any defendant who has told on anyone, can walk in and
8 say, Your Honor, my -- I haven't been given credit for
9 what I did. I don't make that suggestion to the Court
10 today.

11 QUESTION: Well, I'm not sure why not.

12 MR. MARTIN: Well, questions -- questions
13 revolving around the nature and quality of the assistance
14 of the Government, I believe we've agreed with the
15 Government that those questions are uniquely -- are unique
16 questions that the Government, in its own wisdom, can
17 decide on.

18 What we're talking about is when the
19 Government's decision regarding a defendant's assistance
20 goes beyond the sphere of -- of deciding what was
21 appropriate that that particular defendant did.

22 In --

23 QUESTION: So you disagree with the brief of the
24 National Association of Criminal Defense Lawyers?

25 MR. MARTIN: The amicus in our case takes a

1 broader perspective on this issue than we do.

2 QUESTION: And so you disagree with it to that
3 extent.

4 MR. MARTIN: To that extent, that is correct.
5 We do.

6 But I think it's instructive to note that a
7 defendant can, in a sentencing, in the sentencing context,
8 when there is a guideline range, can put on evidence of
9 his own with regard to what assistance was made, so that
10 the determination can be made where to -- where to
11 sentence within the guideline range.

12 Important in this case, of course, there was a
13 mandatory minimum. But there was, I think, a 30-day
14 guideline range. But nonetheless, no evidence was allowed
15 to be put on.

16 I think because the district court just
17 was -- had the assumption that this -- there was no review
18 of the Government's decision. And --

19 QUESTION: Why should there be any review of
20 this at all, I mean for anything -- bad faith,
21 arbitrariness, outrageous unreasonableness, or even
22 unconstitutionality?

23 I mean if your client wants to make a deal he
24 can make a deal. And you can get relief for the
25 Government's going back on its promise. But for the

1 Government's -- when the Government hasn't promised, why
2 should you have any relief at all?

3 MR. MARTIN: Well, Your Honor, the -- I think
4 the simple answer to that question is when Congress
5 created this provision, it gave this discretion to the
6 Government. The Government cannot exercise that
7 discretion in an improper way. I think that's the reason
8 that there can be review.

9 QUESTION: Well, I don't know -- what about if
10 the Government, you know, it has discretion to choose not
11 to prosecute. Suppose it chooses not to prosecute
12 somebody for some unconstitutional reason. Can somebody
13 come in here and get that corrected?

14 MR. MARTIN: At the -- at the -- at -- I'm not
15 sure I know the answer to that. Because that occurs at
16 the earliest stages of the invocation of judicial power.
17 Sentencing occurs at the very end.

18 I think that's the difference. I think they're
19 analogous, but I, you know, I believe that that is the
20 difference in the case. There's a -- there are
21 circumstances when, unfortunately, improper things occur.
22 There's a case from the Ninth Circuit, from February the
23 5th, wherein the judge noticed that the prosecutor, the
24 Redondo Lemos case, where the prosecutor was favoring
25 female defendants over male defendants in making -- on

1 motions for substantial assistance.

2 So I think that's -- that, alone, is reason
3 enough for there to be reviewability in the case. The
4 Fourth Circuit felt otherwise. And we urge the Court to
5 reverse the Fourth Circuit.

6 QUESTION: Thank you, Mr. Martin.

7 Mr. Long, we'll hear from you.

8 ORAL ARGUMENT OF ROBERT A. LONG, JR.

9 ON BEHALF OF THE RESPONDENT

10 MR. LONG: Thank you, Mr. Chief Justice, and may
11 it please the Court:

12 Before I begin my argument, let me respond to
13 the suggestion that there may have been some sort of
14 promises made by DEA agents in this case. That is
15 completely outside the record.

16 I am prepared to say other things that would go
17 outside the record. I think perhaps I should not, unless
18 you invite me. But I would simply note -- first of all,
19 under this Court's decision in Maybury against Johnson, I
20 think that whether or not there was a deal made that was
21 not then adhered to, the guilty plea which the petitioner
22 entered in this case would have been the locus of any
23 constitutional violation.

24 So even assuming what has been suggested here
25 this morning is true, and it -- it is not true, to my

1 knowledge -- it would not be a constitutional violation,
2 and so it would not entitle petitioner to the kind of
3 relief he's seeking here.

4 QUESTION: Well, do you defend the court of
5 appeals decision on its face?

6 MR. LONG: Well, we think the court of appeals
7 decision did not go far enough. It spoke in categorical
8 terms. And we think they have to be qualified. But we
9 think that's not surprising --

10 QUESTION: So that the court was just wrong in
11 saying under no circumstances, without a motion, does the
12 court have power to go downward?

13 MR. LONG: Well, to the extent that the court
14 didn't qualify its statement, it was -- it
15 incompletely --

16 QUESTION: Well, it did say under -- they just
17 said across the board, without the motion of the statute,
18 isn't satisfied.

19 MR. LONG: Yes.

20 QUESTION: And that's the end of the story.

21 MR. LONG: Well, it was -- this case did not --

22 QUESTION: Isn't that right? Isn't that what
23 they said?

24 MR. LONG: That's what they said.

25 QUESTION: And you don't agree with that?

1 MR. LONG: We don't agree with that as an
2 unqualified statement.

3 But we think it's not surprising that the Fourth
4 Circuit made that --

5 QUESTION: And how -- when is the -- when is the
6 Government's decision not to file a motion reviewable?

7 MR. LONG: Well, we think it's subject to a very
8 limited form of judicial challenge, if the defendant can
9 make a substantial threshold showing that the prosecutor
10 is exercising discretion in an unconstitutional manner.

11 And there was no suggestion --

12 QUESTION: Is that the -- is that the only -- is
13 that the limit of the reviewability?

14 MR. LONG: Yes, we think that is the limit.

15 QUESTION: Bad faith is -- I don't know what bad
16 faith, particularly is. But you wouldn't say bad -- an
17 allegation of bad faith would entitle you to a hearing?

18 MR. LONG: Well, I think that's the problem.
19 Bad faith and arbitrariness are vague terms that can take
20 on different meanings.

21 In --

22 QUESTION: Like equal protection.

23 MR. LONG: Well --

24 (Laughter.)

25 MR. LONG: In the petitioner's reply brief, we

1 understood them to adopt a very limited definition of bad
2 faith and arbitrariness, that we think is really just
3 another way of stating the type of judicial review that we
4 think is --

5 QUESTION: Mr. Long, suppose the prosecutor
6 knows that there has been substantial assistance.

7 Must the prosecutor make the motion so far as
8 the prosecutor's duties under the law are concerned, quite
9 without regard to whether or not this is enforceable in
10 court?

11 MR. LONG: No, our view of this section is that
12 the prosecutor does not have any obligation to make this
13 motion in any particular case, even if the defendant has
14 provided a tremendous amount of assistance. That the
15 language simply says upon motion of the Government. It
16 does not state any standards for the Government to follow.

17 QUESTION: Well, if that's true, do you concede
18 that defendants have a protected liberty interest
19 sufficient to trigger the due process clause in having one
20 of these motions made?

21 MR. LONG: No, we do not concede that, Justice
22 O'Connor. We do not believe that either the statute,
23 3553(e), or the guideline, 5K1.1, creates any protective
24 liberty interest because it does not confine the
25 discretion of the prosecutor in any meaningful way.

1 QUESTION: Is this -- is the discretion the same
2 as the discretion to prosecute or not to prosecute?

3 MR. LONG: We think it is very closely analogous
4 to the discretion whether to bring a charge and the
5 selection of charges to bring.

6 And, in fact, in a very small amount of
7 legislative history that there is to go along with 3553(e)
8 recognizes that express connection. It says that this is
9 a way of doing in the open what the prosecutor would
10 otherwise do by manipulating the charging decision, in
11 effect.

12 QUESTION: Well, now, what is the situation if
13 the Government promises the defendant to file a motion
14 under this section --

15 MR. LONG: Well --

16 QUESTION: -- and induces the defendant's
17 cooperation, and then reneges on filing any motion?

18 MR. LONG: Well --

19 QUESTION: Is there any relief possible, and
20 what?

21 MR. LONG: We think it is a different situation
22 if the Government makes a plea bargain. The Government
23 can be held to its bargain or --

24 QUESTION: No, the Government promises that if
25 you will cooperate with us, I'll make a motion at

1 sentencing, for reduction. And the defendant does, and
2 then no motion is made.

3 MR. LONG: If the Government makes that promise,
4 the Government can be held to it by the court.

5 QUESTION: Because it's a plea bargain?

6 MR. LONG: Yes.

7 QUESTION: But what if it's not in a plea
8 bargain? What if the -- what if the arrangement is made,
9 and there's -- assume ample evidence, and the prosecutor,
10 after having it, thinks well, I made a mistake. I
11 shouldn't have made that deal. But the defendant
12 delivers. He says I can get Mr. X caught for you. And we
13 get him put in jail, and all the rest. So total delivery.

14 But the Government -- then, he says, and he
15 comes up for plea bargain, the Government changes its
16 mind. What about that case?

17 MR. LONG: Well, as we read your -- the Court's
18 decision in Maybury against Johnson, as long as the
19 defendant then goes ahead and pleads guilty, and it's a
20 properly counseled guilty plea, there's no constitutional
21 violation in that case. That may be unethical behavior by
22 the prosecutor, and it may be redressable in some other
23 way. But it would not be a constitutional violation.

24 QUESTION: Well, would it be redressable by some
25 kind of an action for specific enforcement to compel the

1 Government to make the motion pursuant to its promise, for
2 which there was a consideration?

3 MR. LONG: We would say not. But I think that's
4 a question of plea bargains. And this case doesn't
5 involve a plea bargain.

6 Under -- we would say certainly that would not
7 be allowed under 5K1.1, itself, or --

8 QUESTION: Would the answer -- would the answer
9 depend on whether or not the Government made it plain
10 before the guilty plea that it was not going to honor the
11 agreement?

12 MR. LONG: Oh, yes. I think if the guilty
13 plea --

14 QUESTION: So if the Government says -- the
15 Government says we're not going to honor it, no problem at
16 all. If the Government -- Government doesn't say we're
17 not going to honor it, still no problem?

18 MR. LONG: If the -- if the -- if the guilty
19 plea is reduced by a misrepresentation of the Government,
20 then under Santabello and other cases, then the guilty
21 plea is invalid.

22 QUESTION: Well, is it induced when it's not
23 made part of the formal plea agreement at the time the
24 plea is entered, but nonetheless had been the subject of
25 an informal agreement when the Government never indicates

1 that it's going to renege on that agreement? Is that
2 inducing it?

3 MR. LONG: Well, I think it could be. But
4 again, that's a question that -- we think that's a
5 question of plea bargaining rather than a question
6 particular to 5K1.1.

7 QUESTION: So you're just saying in effect that
8 that the plea bargain is not limited to a formal plea
9 bargain immediately preceding the entry of the plea?

10 MR. LONG: Well, I think -- in a particular
11 case, that would -- that likely would be the Government's
12 position. We'd try to get the plea bargain written
13 down --

14 QUESTION: But not necessarily.

15 MR. LONG: -- and it says specifically that
16 anything that's not written in this agreement is not part
17 of the agreement, and you're not relying on any other
18 promises.

19 QUESTION: Okay, that makes it clear.

20 MR. LONG: What about apart from plea bargain
21 situation, what -- what do you envision as constituting
22 these constitutional violation exceptions?

23 MR. LONG: Well --

24 QUESTION: Suppose in the instance that counsel
25 posed, that you do have a prosecutor who seems to be more

1 lenient towards women defendants than towards men. Is
2 that a denial of equal protection of the laws to the --

3 MR. LONG: Well, we think --

4 QUESTION: -- to the male defendants?

5 MR. LONG: We think that it could be. In this
6 case it's prosecutorial discretion, like the way he
7 exercises discretion. If it was deliberately intended to
8 disfavor a suspect classification like race, or a semi-
9 suspect classification like sex, we think that could give
10 rise to a constitutional violation.

11 But -- I'm familiar with the particular case you
12 mentioned, Redondo Lemos. And it's -- simply showing that
13 there's some sort of discrepancy in the sentences that men
14 and women receive, I think, would not go nearly far enough
15 to show any sort of a constitutional violation. Because
16 it may well be that the women defendants are not
17 similarly-situated -- that is, they may have a more minor
18 role in crimes as a group, or they may be more willing to
19 provide assistance to the prosecutor. Those, of course,
20 are perfectly legitimate considerations.

21 QUESTION: Mr. Long, a couple of times you've
22 mentioned the case of Maybury against Johnson, which I
23 don't find cited in your brief. Could you give us a
24 citation to that?

25 MR. LONG: Yes, Your Honor, that's at 467 U.S.

1 504.

2 QUESTION: What is the theory that permits the
3 court to inquire if there's a constitutional violation,
4 that the processes of the court cannot be used to reach an
5 unconstitutional result?

6 MR. LONG: I think that's it. We derived this
7 from this Court's prior decisions on prosecutorial
8 discretion cases, which have never found a violation, but
9 have always suggested that the court could inquire.

10 We think it is part of the inherent supervisory
11 power of the court, in the course of sentencing, or in the
12 course of proceeding on charges.

13 QUESTION: Well, if you can inquire under the
14 supervisory powers to prevent a constitutional violation,
15 why not to prevent a statutory violation?

16 MR. LONG: Well, because it's established under
17 the Bank of Nova Scotia and other decisions that the court
18 cannot exercise its supervisory power to negate statutes.
19 And we think it's clear -- indeed, we think the petitioner
20 concedes -- that Congress intended, in 3553(e), and the
21 Sentencing Commission intended in 5K1.1, to commit to the
22 prosecutor's discretion this decision whether to file a
23 motion.

24 If the court were to simply begin second-
25 guessing it under an arbitrary and capricious --

1 QUESTION: Well, let's assume for the moment
2 that there's a violation of the prosecutor's discretion,
3 and therefore the statute.

4 MR. LONG: So there's been an unconstitutional
5 exercise.

6 QUESTION: No, not unconstitutional, just an
7 abuse of discretion -- unless you're saying all abuses of
8 discretion are unconstitutional.

9 MR. LONG: Well, no, our view of this is that it
10 commits the decision to the prosecutor's discretion in the
11 sense that --

12 QUESTION: But I'm assuming that this discretion
13 has been abused.

14 MR. LONG: Well, our view of it is the only type
15 of abuse that's created here is the -- is the decision for
16 unconstitutional reason. We believe the prosecutor could
17 refuse to file this motion for any reason, or for no
18 reason -- as long as it's not an unconstitutional reason.
19 That's our position.

20 QUESTION: Well, I must say that's -- we have a
21 lot of statutes that commit things to the discretion of
22 agents of the executive branch. And I don't -- I don't
23 know that that is ever taken to mean absolute discretion.
24 It means reasonable discretion.

25 And if you act arbitrarily or capriciously,

1 you're acting unlawfully.

2 MR. LONG: Well, again, Justice Scalia, we don't
3 think this is the typical case of agency action, where
4 there's a strong presumption of judicial review. If there
5 were that presumption we'd take the language of the
6 statute that says upon motion of the Government and refute
7 it.

8 But in addition, we're --

9 QUESTION: Oh, I don't deny that.

10 I -- I'm -- like Justice Kennedy, I'm just bemused at why
11 we have somehow have authority to move in for
12 constitutional violations, but not for statutory
13 violations. Against the law is against the law.

14 MR. LONG: Well, I think the distinction, and we
15 draw it from this Court's decision in cases such as
16 Webster against Doe, is that if the Congress means to
17 preclude review of constitutional questions, unless they
18 say so extremely clearly -- there's a kind of a plain
19 statement requirement -- and, of course, we also draw it
20 from cases closer to this situation in prosecutorial
21 discretion cases, such as Wayte, Bordenkircher, and Boiler
22 against Bowles, where this Court has always assumed that
23 that kind of violation would be subject to a judicial
24 review.

25 And we think that it is a -- a proper exercise

1 of the court's supervisory authority, if confined to this
2 very narrow situation.

3 QUESTION: Can a United States attorney, in your
4 view properly, say that in this district we're not going
5 to give any credit for cooperation, ever? We're just not
6 going to enforce that part of the statute.

7 MR. LONG: Yes, we think that would be proper
8 if, for example, the U.S. Attorney decided that they were
9 getting good cooperation from defendants in that district,
10 and there was no particular reason to allow defendants to
11 have less than the minimum sentence that Congress has
12 established -- or the sentencing commission has
13 established. We think that would be perfectly
14 appropriate.

15 QUESTION: And you think that this is consistent
16 with the intent of the Congress, as expressed in the words
17 of the statute?

18 MR. LONG: Yes, we do. In fact, we think it is
19 required by the language that the Congress used, and they
20 emphasized it in 3553(e), in the heading. It says a
21 limited authority may impose the statute below -- a
22 sentence, rather, below the statutory minimum.

23 That is authority limited to the situation in
24 which -- in which the prosecutor files a motion.

25 And we think, even in addition to the language

1 and the legislative history, which draws the express
2 connection to other matters committed to prosecutorial
3 discretion, such as the charging decision, we think the
4 nature of this substantial assistance decision really is
5 quite analogous to the charging decision.

6 The judicial review of this would require courts
7 to get into matters that are really not well-suited to
8 judicial review.

9 QUESTION: Suppose the United States attorney in
10 the District said that you have to give credit for
11 cooperation. But an assistant United States attorney took
12 the other position. He says this is just not necessary,
13 and it's a -- our sentences are too low. And he refused
14 to follow the orders of the United States attorney.

15 Could the -- would the defendant be entitled to
16 a hearing in that instance? Would there be an abuse of
17 discretion there?

18 MR. LONG: Well, first of all, let me say that
19 we have internal guidelines --

20 QUESTION: Well, just play with the
21 hypothetical, if you could.

22 MR. LONG: Well, we would think that that would
23 not be unconstitutional. The defendant has no right to
24 any particular process within the U.S. Attorney's office.

25 QUESTION: And there's no abuse of discretion in

1 that instance?

2 MR. LONG: Well, again, there might be abuse of
3 discretion in a sort of ordinary, administrative law
4 sense. But we -- in this area of prosecutorial
5 discretion, we don't think that that's something that the
6 courts can or should review.

7 I wanted to add that there is an internal
8 procedure now in effect, that these motions can only be
9 filed with the approval of the U.S. Attorney, First
10 Assistant U.S. Attorney, or one of the supervisors in the
11 Criminal Division of the U.S. Attorney's Office. So that
12 your question really is a hypothetical one and it should
13 not happen in practice.

14 It was mentioned that this sort of question, if
15 reviewed by courts, would require them to get into factors
16 that really are not suitable for judicial review. They'd
17 have to balance the deterrent value of going ahead and
18 sentencing a convicted defendant to at least the minimum
19 sentence proscribed by law, against the potential benefit
20 of encouraging other defendants to cooperate with the
21 Government -- which we think is the whole purpose of these
22 substantial assistance provisions.

23 And that sort of judgment will often turn on the
24 Government's enforcement priorities, and enforcement plan,
25 as in the charging decision that this Court discussed in

1 Wayte.

2 Review would also impose some very significant,
3 systemic costs. It would certainly delay proceedings; the
4 deliberations of the U.S. Attorneys would be opened to
5 outside inquiry. And we think that the prosecutorial
6 effectiveness might be undermined if the Government's
7 enforcement policies were revealed.

8 If defendants knew exactly how much cooperation
9 they had to supply in order to come within some standards,
10 they would probably do the minimum, and not give all the
11 cooperation that they could.

12 We think it's clear that defendants would seek
13 extensive discovery -- not just about their own case, but
14 about other cases -- because they'd want to make
15 comparisons; they would want the prosecutor to explain,
16 probably take the stand -- if they could get him to do
17 it -- and explain the basis for the decision.

18 And really, that's precisely what the petitioner
19 is asking for in this case. At page 11 of his petition,
20 he said that he wanted an inquiry on the record as to
21 the -- as to the decision-making process in the Middle
22 District of North Carolina, in general; as well as the
23 decision-making process in this case, in particular.

24 QUESTION: Of course we could -- we wouldn't
25 necessarily allow all that discovery, if we disagreed with

1 your position.

2 MR. LONG: Well, that's right. And no doubt we
3 would --

4 QUESTION: You could require him to just tell
5 his own story, and see what --

6 MR. LONG: That's right. I'm sure we would
7 oppose that discovery if we got to that point. But that
8 would be the direction in which we would be headed.

9 Finally, I'd like to point out if I could what
10 we think is a basic difference between the substantial
11 assistance provision and certain adjustments to the base
12 offense level that the sentencing guidelines recognize.

13 There are adjustments for obstruction of
14 justice, for acceptance of responsibility; there's a
15 victim-related adjustment; adjustment for role in the
16 offense. Now, those adjustments are required in certain
17 circumstances, by the language of the guidelines. And we
18 think that's so because they are things that the defendant
19 really has control over. The defendant controls whether
20 he obstructs justice, or whether he took a minor role in
21 the offense or not. And we think they also go to the
22 defendant's level of culpability.

23 We think substantial assistance is really
24 different in a basic way. The defendant may be very
25 willing to help, and wants to do all he can for the

1 Government, truly sorry for his offenses. But if he
2 hasn't got valuable information, he's not going to get
3 this substantial assistance motion. He's not entitled to
4 it.

5 In fact, the sentencing commission amended 5K1.1
6 in 1989 to make it clear that a good-faith effort is not
7 good enough. You have to produce results. And you may,
8 through no fault of your own, just be unable to produce
9 results.

10 So we think the substantial assistance motion is
11 not something that's a right to any particular defendant.
12 It doesn't necessarily reflect their culpability. Rather,
13 it is a tool that's available to the prosecutor, like the
14 charging decision, to conduct his business, and in the
15 public interest, and to encourage cooperation, while still
16 attempting to prosecute the guilty.

17 QUESTION: Can you tell me, suppose the
18 defendant thinks he can produce a very important result.
19 Is it practicable for him to insist on a plea agreement at
20 this early stage of investigations, or are plea agreements
21 usually so close to the time of a plea that the
22 cooperation would have either taken place or not, by that
23 point?

24 MR. LONG: I don't want to tell you something
25 I'm not sure of. I'm not positive. My strong feeling is

1 that plea agreements can be made at different stages in
2 the prosecution -- not just at the end, but at the
3 beginning. So I think it would be practicable for a
4 defendant to make that kind of agreement. But I'm not
5 positive.

6 Let me say just a word about the arbitrary and
7 capricious standard of review. We've addressed that
8 already.

9 As long as petitioner confines himself to the
10 narrow definition that he adopted in his reply brief, we
11 think that's really just another way of stating the kind
12 of review that we think is available, we don't object to
13 it.

14 And I think I heard --

15 QUESTION: Which is a constitutional violation,
16 is that right?

17 MR. LONG: Yes. I think I heard him this
18 morning revert back to what he seemed to be
19 suggesting -- not in any detail in his opening
20 brief -- which is that a decision couldn't violate
21 substantive due process, if it was just very wrong, a big
22 mistake.

23 And we think that's not correct. This Court has
24 recognized that defendants are not entitled to
25 individualized sentencing outside the capital sentencing

1 context. Petitioner was convicted in accordance with
2 laws. So we think he's eligible for any punishment that's
3 authorized by the statute, as long as it's not cruel and
4 unusual, or based on the kind of arbitrary distinction
5 that would violate the equal protection component of the
6 Fifth Amendment Due Process Clause.

7 And finally, let me just say a word about the
8 remand question. There may not be much left to say about
9 that. But let me just read from page 10 of the joint
10 appendix. This was the sentencing hearing.

11 In fact, let me just back up for a minute, and
12 point it out. On page 8, petitioner was really making a
13 very different argument to the district court. If you
14 look on page 8, at about the middle of the page, it says,
15 my argument is that at section 5K2.0 of the
16 guidelines -- a different provision of the guidelines,
17 which is the general provisions of departure -- the court
18 is allowed to take into consideration items and
19 information and evidence, which, if it considers them not
20 to have been treated, or if it considers them not to have
21 been adequately taken into consideration.

22 And my argument to you is that the evidence in
23 the pre-sentence report would indicate that there is a
24 level of cooperation -- and although the Government, in
25 its wisdom, chose not to grant substantial

1 assistance -- they may not have been adequately taken into
2 consideration by the sentencing commission, that this type
3 of evidence might allow for a downward departure.

4 That's really a very different argument. He
5 helped so much in this case that the sentencing commission
6 really couldn't have taken into account this level of
7 assistance. And therefore, this goes beyond 5K1.1 and
8 takes him into the realm of this other guideline.

9 And the court, quite reasonably, responded well,
10 maybe that's true or maybe it's not. But here we have a
11 15-year mandatory minimum sentence. You're not suggesting
12 that I could go below a sentence established directly by
13 Congress, are you? And the petitioner responded, well, I
14 believe that you could. I do not -- I'm now on page 9 of
15 the joint appendix -- I do not have a case to cite to you
16 on that.

17 And that's the point where the court said well,
18 I believe I'm going to let you make some law. Because I
19 do not believe so. I do not believe I have that
20 authority -- addressing this other argument that
21 petitioner made.

22 And then, of course, the -- on page 10 of the
23 joint appendix, the part that we've already been over, the
24 court did say, you may state for the record, in the event
25 you desire to appeal, what the evidence would be, inviting

1 petitioner to make a proffer. And then he did. He went
2 on for several paragraphs proffering his evidence.

3 He went exclusively to the help he'd given, the
4 cooperation he'd given. And the court said, all right,
5 sir. And petitioner's lawyer said, that would be our
6 proffer.

7 So we think that petitioner has had a perfectly
8 adequate full opportunity to present whatever his evidence
9 would be. And so a remand in this case is certainly not
10 warranted.

11 If there are no further questions, I thank the
12 Court.

13 QUESTION: Thank you, Mr. Long.

14 Mr. Martin, you have 3 minutes remaining.

15 REBUTTAL ARGUMENT OF J. MATTHEW MARTIN

16 ON BEHALF OF THE PETITIONER

17 MR. MARTIN: Thank you, Mr. Chief Justice.

18 To respond to a question that Justice Kennedy
19 asked Mr. Long, with regard to what happens in the
20 situations where assistance is provided right up
21 front, which is clear from the record what happened in
22 this situation, I think that it's -- that it's appropriate
23 to note that those -- that that type of cooperation, and
24 whatever is said to bring that about, is known by the
25 prosecutor at the time later his decision-making process

1 goes into effect.

2 Quite often -- I would say, in fact, virtually
3 every time -- that type of situation occurs, the defendant
4 is uncounseled, and is there on his own at that point.

5 I believe that this Sentencing Reform Act --

6 QUESTION: I'm a little puzzled by it -- how do
7 you know that he's uncounseled at that time?

8 MR. MARTIN: I -- I -- I believe that it's clear
9 from the record and from the court of appeals brief that
10 immediately upon his arrest, he made this cooperation.
11 And additionally, in the record that the Court has, it
12 notes when I was appointed to represent him, which was
13 sometime after that.

14 I guess you can infer that there were no other
15 attorneys. But in the record you will see where I was
16 appointed, on October 30. I was certainly not appointed
17 to represent the petitioner when he was arrested.

18 What we ask the Court to do is to reverse the
19 Fourth Circuit and hold that there are circumstances
20 that -- wherein the district court may inquire into the
21 Government's reasons for denying the substantial
22 assistance motion, and remand this case to the district
23 court for further proceedings in that context, to allow
24 the defendant the opportunity to make a threshold showing.

25 Thank you.

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Martin.
The case is submitted.
(Whereupon, at 11:57 a.m., the case in the
above-entitled matter was submitted.)

CERTIFICATION

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

NO. 91-5771 - HAROLD RAY WADE, Petitioner V. UNITED STATES

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

BY Ann-Mari Federico

(REPORTER)