OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DARREN J. CUSTIS, Petitioner v. UNITED STATES

CASE NO: No. 93-5209

PLACE: Washington, D.C.

DATE: Monday, February 28, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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DARREN J. CUSTIS, :

Petitioner :

v. : No. 93-5209

UNITED STATES :

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Washington, D.C.

Monday, February 28, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

MARY FRENCH, ESQ., Baltimore, Maryland; on behalf of the Petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-5209, Darren Custis v. United States.

Ms. French.

ORAL ARGUMENT OF MARY FRENCH

ON BEHALF OF THE PETITIONER

MS. FRENCH: Mr. Chief Justice and may it please the Court:

The district court's refusal to consider the constitutional claims in this case had a profound effect on the sentence that was imposed. If any one of the three prior convictions had not been counted for enhancement, Mr. Custis would have been facing a sentence of 10 years, maximum, in prison.

Counting the three prior convictions increased the statutory maximum from 10 years to life in prison, and also triggered a mandatory minimum penalty of 15 years in prison. The actual sentence of nearly 20 years that was imposed was nearly double the statutory maximum that would have been otherwise authorized.

The court of appeals recognized that some constitutional claims must be considered during sentencing enhancement proceedings under the Armed Career Criminal Act. The Government also concedes that point.

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The issue presented is which constitutional claims should be considered at sentencing enhancement proceedings under the ACCA. Our position is that violation of the right to effective assistance of counsel in entry of an unknowing and involuntary plea are constitutional errors similar in magnitude to the Gideon violations which this Court has recognized cannot be used to support enhanced punishment.

I'd like to cover three points. First --

QUESTION: Ms. French, to what extent do you think our decisions in Federal habeas, where a State defendant is raising a constitutional claim such as the Boykin type claim, the Parke v. Raley case, to what extent are those either informative or controlling in this context?

MS. FRENCH: I think that some of those cases can be informative. Generally, I don't believe that the habeas corpus principles would be directly applicable, but there are some principles that might inform the Federal district court's consideration of these challenges.

QUESTION: Do you think this is -- we're dealing here with the question of the intent of Congress, or whether, regardless of congressional intent, it simply couldn't authorize these priors to be considered without having satisfied itself in some way that there was no

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constitutional violation in connection with them?

MS. FRENCH: I think our primary argument is that the Constitution requires that these claims be considered. In terms of the statute, it doesn't authorize challenges or prohibit challenges, but if you look at the backdrop against which it was enacted, the Federal courts had been allowing challenges for a number of years.

QUESTION: Well, if you're going to make any challenge based on statutory construction, really, logically that ought to be your first line. We ordinarily don't reach a constitutional question unless we find it necessary to do so.

MS. FRENCH: That's true, Your Honor, and our position on the statute is that at the time it was enacted, it was enacted against a backdrop of decisions including this Court's decisions in Burgett v. Texas and United States v. Tucker.

We are not arguing that the statute itself authorizes challenges, but we are -- our position is that because of that backdrop, if Congress had wanted to abrogate Federal court review of prior convictions, then it would have made that intent express, and so that is our position on the statute.

Established principles forbid the imposition of a mandatory minimum sentence based on prior convictions

that are obtained in violation of the Constitution. This Court in Burgett v. Texas ruled that a prior uncounseled conviction cannot be used to support guilt of another offense, and the Court's reasoning in Burgett was essentially that to use a conviction in that manner would erode the original constitutional right and would also force the defendant to suffer anew from that violation.

QUESTION: Do you think that makes much sense, that line of reasoning?

MS. FRENCH: I think it does, Your Honor, because if you look at the opinion of the court of appeals and of the district court in this case, essentially what those courts held is that it simply does not matter if the defendant -- if the defendant's prior conviction resulted from a constitutional violation, and therefore they would require that the district court ignore any constitutional violations that took place.

And so in that sense, doing that would erode the original constitutional right, and in terms of the defendant suffering anew, I think it's clear in this case, because of the direct impact that counting the prior convictions had, that it clearly increased the statutory maximum as well as invoked a mandatory minimum, so for those reasons, that reasoning would apply in this situation.

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QUESTION: Ms. French, why isn't it reasonable to say, yes you can attack convictions on the grounds that you're asserting, but you must do so where they are rendered, not concern another forum many years later that doesn't have the record.

Why can't this be regarded as a "where" question, not "whether"? Yes, you can attack a conviction on these grounds, but you can do it on direct attack, you can do it on collateral attack in the State where it was rendered.

Why isn't it reasonable for Congress to say, you have those other avenues of attack open, we don't have to give you yet another?

MS. FRENCH: Your Honor, Congress has not actually said that, but the problem with it -- there are a number of problems. One is that actually in Maryland the Maryland courts have invited other jurisdictions to examine the constitutional validity of prior convictions obtained in Maryland that other jurisdictions would like to use for sentencing enhancement, and Maryland has specifically said that they will not review those convictions in that manner.

Often a defendant, by the time the prior conviction is being used against him for sentencing enhancement, he has no avenues for State relief at that

point, and so he would not be able to bring a State post conviction, and with respect to the types of claims that we're alleging here, he probably would have had no opportunity to --

QUESTION: Would you clarify this, because it may be relevant: whether under Maryland law any or all of the claims your client now wishes to make could have been litigated, either on direct review in Maryland, or on some kind of postconviction review?

MS. FRENCH: The ineffective assistance of counsel claims are not generally reviewable on direct appeal in Maryland, and that's because the record is not normally developed enough for the court of appeals to review that violation, and the same is true as to the claim of an unknowing and involuntary plea.

However, Mr. Custis could have brought a post conviction action with respect to the 1985 conviction. He could not have brought one with respect to the 1989 conviction because he was never in custody.

QUESTION: Did you challenge both prior convictions on the basis of ineffective assistance? Is that --

MS. FRENCH: Yes, Your Honor.

QUESTION: Now, could he have obtained Federal habeas review of these claims?

MS. FRENCH: Your Honor, I think there are two different kinds of Federal habeas review that you might be referring to.

QUESTION: Well, he was still on probation, so for purposes of being in custody.

MS. FRENCH: He could have pursued a 2254 petition, and he would have to be in custody to bring that petition. The problem is that if he had not exhausted State remedies, then he would not be able to have that claim reviewed, and so --

QUESTION: But if there were no State remedy, then there's no exhaustion problem, right?

MS. FRENCH: That's true, so that would have been --

QUESTION: You can't have it both ways. You're here saying he had no State remedy.

MS. FRENCH: That's right.

QUESTION: So presumably Federal habeas could have been used.

MS. FRENCH: As to the 1985 conviction, I think that's true. As to the 1989 conviction, he was never in custody for purposes of that conviction, so I don't think he would have been eligible to pursue either type of review.

QUESTION: Why should we choose Burgett-Tucker

reasoning rather than Lewis reasoning to construe the congressional silence?

MS. FRENCH: Your Honor, Lewis did not deal with a sentencing enhancement statute, and it specifically reaffirmed Burgett and Tucker.

Lewis dealt with a very unusual statute in which the legislative history was clear that Congress had intended to legislate very broadly and try to keep guns out of the hands of dangerous people, and Congress not only prohibited convicted felons from possessing guns, but also anyone who had an indictment pending, and so there were other considerations present in Lewis that are not present here.

QUESTION: Couldn't we take the position that just as it may be appropriate, or may have been appropriate for Congress to identify kind of a high risk class, as in Lewis, it would also be appropriate for Congress to identify a very high risk class by reference to three convictions and violent offenses?

MS. FRENCH: Congress could have done that, but I don't think they did that in this instance.

QUESTION: Why not?

MS. FRENCH: Well, once the defendant has been convicted under section 922(g), then he's already been classified, and he's been shown to be guilty of that

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offense.

The mandatory --

QUESTION: No, but Congress could simply say we want a further classification, and in effect he's on notice that if there are three convictions that satisfy the other criteria for the convictions, he's facing this significantly enhanced penalty. It increases the deterrence.

MS. FRENCH: Your Honor, that's true, but the statutory history, the legislative history shows that Congress' purpose in enacting section 924(e) was actually incapacitation. In other words, to take this defendant and lock him up for a minimum of 15 years so that he won't commit these underlying crimes such as burglary and robbery, there was no indication that Congress intended to classify defendants through that penalty provision, and increase deterrence in the manner that you're suggesting.

QUESTION: Why don't we infer that Congress meant you give the prior conviction the same faith and credit it had in the jurisdiction where it was rendered if you want to get it upset there, but unless and until you do, then this is -- the conviction of the State of Maryland is in effect the conviction for all of the United States?

MS. FRENCH: Your Honor, there are a few reasons

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why that -- those principles aren't applicable here. First of all, I would note just as a factual matter there were no judgments of conviction introduced in this case, and so obviously there were no duly authenticated judgments of conviction, and that would be required to invoke full faith and credit, but there are a number of other, broader reasons why full faith and credit would not apply here.

One I think is that the issues which here are ineffective assistance and unknowing and involuntary plea were not actually litigated in the prior proceeding, and there would have been no possibility of litigating them during those proceedings, because the violations actually took place during those proceedings.

In addition, in Maryland there's no collateral estoppel unless the claim being heard in the prior adjudication was identical with the one presented in this case.

QUESTION: But if there's a constitutional infirmity, it's got to be where it was rendered. If a judgment is good where it's rendered, it's got to be good everyplace else in the United States. If there's a constitutional flaw that infects these convictions, then they can't stand where they're rendered. It's strange to say that you can have a conviction that's good in Maryland

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but not elsewhere in the United States.

MS. FRENCH: Well, Your Honor, I don't know if you could say it's good in Maryland. In this case, we're simply asking the Federal district court to examine the constitutional validity to decide whether it should impose an enhanced sentence based on the conviction.

The only reason why the conviction is still good in Maryland is because there's no opportunity to pursue relief there, so that would be why the prior conviction, even though it's not technically overturned in Maryland, should not be used for sentencing enhancement in the Federal case.

I would also just note that normally a guilty plea is not a valid and final judgment under collateral estoppel law, and in Maryland there's no nonmutual collateral estoppel in criminal cases, so for all those reasons, I don't think full faith and credit would be applicable.

The principles of Burgett were applied directly to Federal sentencing in United States v. Tucker, and the same reasoning was applied in Tucker. In addition, the Court stated that it would be unconstitutional for the sentencing court to rely on misinformation of a constitutional magnitude.

QUESTION: Well, is Burgett limited to the

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situation where the conviction is void? I mean, no representation by counsel at all, for example, clear on the face that it's void?

MS. FRENCH: I don't think so. I don't think so, Your Honor. Burgett does use the phrase, "presumptively void," but I don't think that was intended to limit claims to convictions that are invalid on their face, but rather simply to refer to the fact that at least in the context of getting in violations there's no further inquiry required, and my understanding of the term, for example from Parke v. Raley, it's a term that's used to determine where the burden of proof is placed.

In other words, if a prior conviction is obtained in violation of the right to counsel, then the burden of proof is properly placed -- well, it's simply assumed that that conviction is -- cannot be used for enhancement, because it's just an intolerable risk that it is too unreliable to be counted, but that in other situations the burden of proof would be properly placed on the defendant, and then the Government would have an opportunity to respond, so I don't think there's anything about Burgett that limits the challenges to convictions that are void on their face.

QUESTION: Well, certainly in Federal habeas law, if you look at Johnson v. Zerbst, which is one of the

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earliest Federal habeas -- where the Court says that where there was no appointment of counsel that was an actual lack of jurisdiction in the Court, and I don't think we've ever said that about other constitutional violations. That suggests a distinction between failure to appoint counsel at all and any number of other constitutional violations.

MS. FRENCH: That's true, but I don't think that -- I think that when the term void was used in Burgett v. Texas, I believe what it meant was voidable, because the conviction itself would still be in existence, and in fact in that case it was. It had not been overturned in the jurisdiction where it was obtained, so that it would be incumbent on the defendant to come forward and have that actually reversed, and so I don't think that that distinction was intended to limit or draw the line on which claims could be considered.

It's true that if it's a jurisdictional defect, then it would be deemed void and not just voidable, but the constitutional claims that are brought in Federal sentencing proceedings have never been limited in that fashion.

In fact, I would just note that Burgett referred to other constitutional errors prior to stating the holding, there was some discussion about other

constitutional errors that are applicable or constitutional rights that have been applied to the States that would be considered limitations on State court sentencing.

The Government has argued that the structural defect should be used in order to determine which claims should be considered in Federal sentencing proceedings. We believe there's a critical flaw in the use of that test as a threshold test to determine which claims should be heard.

The structural defect test doesn't identify all errors that undermine the reliability of a conviction. Instead, that test was designed to determine which errors would require automatic reversal and not be subject to harmless error analysis, and the fact that an error is not a structural defect does not mean that it doesn't go to the reliability of the conviction, and as an example, I would just point to a case where a coerced confession was introduced against a defendant and was the chief or sole evidence against the defendant.

In that instance, that error is not considered structural, and it would be subject to harmless error analysis, but it would be deemed to be harmful, and therefore the resulting conviction would be unreliable, and that's an error that should be recognized in Federal

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sentencing proceedings under the ACCA.

QUESTION: The fact that a court were to determine that the introduction of a coerced confession was not harmless error would not necessarily be on the basis of the fact that the coerced confession made the conviction unreliable. Under the definition of coercion that this Court has adopted, there are lots of elements to it that do not necessarily lead one to conclude, I think, that the statement was unreliable, but just it's not permissible for the Government to use this sort of method to get a statement out of a person.

MS. FRENCH: I think that could be true in some cases, but certainly in a lot of cases it would also indicate that the resulting conviction cannot be relied upon as an indicator of guilt, and that's because generally coerced confessions are not considered reliable in and of themselves, so I would agree there may be some instances where it would not go to reliability, but I think in most instances it would, and the claim should not be barred as a threshold matter from consideration in Federal sentencing proceedings.

Whether or not the structural defect test applies, we believe that the claims that Mr. Custis raised in this case should be reviewed in a Federal sentencing proceeding. First of all, they do qualify as structural

defects, and second, they do undermine the reliability of the resulting conviction.

QUESTION: You're suggesting that a Boykin violation or a denial of effective assistance of counsel are structural defects?

MS. FRENCH: Your Honor, I'm -- yes. Ineffective assistance I believe would qualify as a structural defect, because in order to establish a violation, a defendant has to prove prejudice, and that means that the defendant has to show a reasonable probability that the result of the proceeding would have been different but for counsel's incompetence. In the context of the guilty plea, that test would be that the defendant show that the error had an outcome, had an effect on the outcome of the plea process.

QUESTION: That's a very substantial extension of what we've had to say about structural defects.

MS. FRENCH: Well, Your Honor, we're not advocating that that test should apply by itself. We believe that structural defects plus other errors that go to reliability should be recognized by Federal district courts in the sentencing proceedings, but I think that there is a strong argument that ineffective assistance of counsel would be a structural error once it is shown, because to show that claim, the defendant has to have

shown that there was a breakdown in the adversarial process and that the result of the proceeding is unreliable, and that's not the type of error that can be analyzed in light of the other evidence presented.

QUESTION: Ms. French, that wasn't my understanding of what we meant by structural.

I thought what we meant by it, and the reason we said that that's the criterion of whether harmless error analysis can apply, is whether it's the kind of an effort that infects the entire proceeding so that you can't separate out the harm that comes from it, and in effect, not having counsel at all, you indeed cannot possibly tell what harm came from it, but if there is ineffective assistance of counsel, you point out the instances in which he was ineffective. He didn't get this witness, he didn't get the other witness, he didn't interview somebody.

You can tell what harm came from those things and whether in fact the result was harmless, so I don't see -- you're using structural as sort of synonymous with causes the result to be unreliable. I don't think that's how we used it in our past decisions.

MS. FRENCH: No, Your Honor, that's not what I intended to say. I agree with your view of what structural defect -- what the structural defect test is,

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and I think it just depends on whether you look at ineffective assistance in terms of the requirement of proving both prongs, which would be the attorney incompetence, and the prejudice, or whether you just look at the first prong, and then consider this second prong a harmless error type test.

QUESTION: Well, it -- attorney in -- it isn't enough to show you had an incompetent attorney. I mean, you can't bring in witnesses who say yes, I practiced with this man for 30 years and he is really incompetent. You have to show that his behavior at trial was incompetent, isn't that right, and you have to show, this is what he did that he shouldn't have done, or this is what he didn't do that he should have done, and it is possible to identify the consequences that flow from those particular instances of incompetence, hence, ineffective assistance of counsel is not a structural defect.

MS. FRENCH: Well, that's true, but I think that in addition to showing that the attorney's performance fell below those minimal standards, the defendant also has to show prejudice resulting from that, and if the defendant is able to take out that claim, a meritorious ineffective assistance claim, then he has shown that the result of the proceeding is unreliable.

Another way of putting it is that it's

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impossible to analyze the effect of that error in light of other evidence presented, particularly when we're talking about a guilty plea, because in the context of a guilty plea, the defendant has to show that he would not have pleaded guilty but would have insisted on a trial, and so it's an error that would affect the framework of the proceeding under the structural defect test.

QUESTION: Are you using prejudice as synonymous with harm? I think the two requirements may be quite different. That is to say, the mere fact that you didn't get this witness introduced would have prejudiced you. However, it still might have been harmless. Do you acknowledge you can have prejudice that is harmless?

MS. FRENCH: Well, Your Honor, I think if you've met the prejudice prong of Strickland --

QUESTION: Then there can't --

MS. FRENCH: -- then you have shown harm.

QUESTION: Then there can't be harmless error.

MS. FRENCH: I don't believe so. There's no further harmless error analysis.

QUESTION: So then there's no such thing as harmless error for ineffective assistance of counsel.

MS. FRENCH: That would be our position. Once you've shown the claim, once you've made out the claim on the merits, that there's no further inquiry.

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QUESTION: Do you think it's not a proper interpretation of the statute to say that things that are obvious on the face of it, like no counsel, you can use to attack a prior conviction, but where you would sidetrack the sentencing forum into an entire hearing and investigation, another kind of trial-type episode, that's not what Congress wanted?

MS. FRENCH: Your Honor, I don't think there's any suggestion that Congress intended to limit claims based on the factual inquiry required. That is the approach that the court of appeals took. I also don't think that that would be consistent with Burgett and Tucker, and I think it would violate the Constitution to decide which claims can be heard based --

QUESTION: But I thought those were cases where the absence of counsel was something -- you had counsel or you didn't have counsel, whether counsel is effective or the knowledge the defendant had may require an investigation, at least a transcript, perhaps calling witnesses, quite different from did you have counsel or didn't you have counsel.

MS. FRENCH: I think sometimes it would require more of an inquiry, but other times it might be a similar inquiry, because in the case of a Gideon violation there's always the question of whether there was a valid waiver,

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and that can go into a number of factors about the defendant and the proceeding, and so I don't think they can always be distinguished on that basis.

If there are no further questions, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Ms. French.

Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE RESPONDENT

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

If I could first address the question raised by Justice O'Connor, I believe, as to whether there were any remedies at any point or would be now with respect to the two prior convictions in the Maryland courts or in the Federal habeas courts, I think the answer is yes.

The first conviction was a 1985 conviction for which the defendant was given 8 years -- I believe 5 years in custody and a 3-year probationary term to follow. That 8 years was still running at the time he was arrested and charged in this case, and in fact if I -- although this was not a matter that was made a part of the discussion in the lower courts, nonetheless the presentence report indicates that he was charged a with violation of probation based on what happened in this case.

His probation was violated in the 1985 case, so he would, given Maryland habeas law, which is effectively equivalent to Federal habeas law, he would have been able, even at that point, to go into the Maryland courts and challenge his 1985 conviction.

The -- of course he would have been able to challenge that conviction at the time, either on direct appeal or immediately thereafter on habeas if he wanted to raise the ineffective assistance of counsel claim which was raised with respect to the 1985 conviction.

With respect to the other conviction, the 1989 conviction, we do not understand the claim ever to have been a claim of ineffective assistance of counsel. That wasn't the claim that was raised in the district court in this case.

The claim that was raised in the district court in this case was essentially a Boykin claim, although based principally on State law, but in any event, that -- although the sentence that was given in that case was a noncustodial sentence, nonetheless, that conviction could have been appealed immediately in the Maryland courts.

Neither of these two convictions was appealed. Both of them were -- well, one of them was a guilty plea conviction, the other was a conviction obtained on what's called the stipulated facts, a plea of not guilty with

stipulated facts.

QUESTION: Mr. Bryson, isn't it probable that most of these cases are going to be challenges to guilty pleas?

MR. BRYSON: Yes.

QUESTION: Because there are so many of them, so the real question is, can you expect the defendant to immediately appeal from a guilty plea?

MR. BRYSON: Well, Your Honor, a lot of defendants do appeal from guilty pleas, particularly if they don't like the sentence, but the real question is, if something has gone terribly wrong, at least you can expect the defendant either to appeal immediately or to come back with a State habeas or Federal habeas action challenging the guilty plea at some point if he's dissatisfied with the disposition.

The irony here is that the reason guilty pleas are typically not challenged is because of the reason that they're tendered, is because the defendant really doesn't have any quarrel, or at least understands that he doesn't have any legal quarrel with the State's case. The basic principle that this Court has recognized again and again is that if you are pleading guilty, if you're talking about the guilty plea case, in the vast majority of cases you're talking about somebody as to whom there is no

serious question of guilt.

QUESTION: That's right. In a vast majority of those cases, there won't be any basis for a challenge, either, because the record normally shows that the normal procedures were followed, but the problem I suppose we have is in the case, the rare case where a defendant does come in with a transcript that shows a very plain violation of his constitutional rights, and your suggestion is that should simply be ignored.

MR. BRYSON: Yes, Your Honor. The bottom line of our position is that even if the transcript shows something that would be -- give him a reversal in a minute had he taken a direct appeal, that that can't be the subject of a collateral attack at the sentencing enhancement proceeding.

QUESTION: Unless it's structural.

MR. BRYSON: Unless it's structural, that's right.

QUESTION: Why structural?

MR. BRYSON: Well --

QUESTION: Why do you pick that as the test for your exception, rather than unless it goes to the court's jurisdiction, or something of that sort?

MR. BRYSON: Well, I think it's essentially the same thing. I mean, jurisdiction, we're using

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jurisdiction in a somewhat -- in the modern sense. We're saying that the denial of counsel -- we start with the denial of counsel.

We know that that is the kind of violation that's cognizable in a challenge to a sentence at sentencing, to a conviction that's used for enhancement, so our question is, well, what else has the same qualities as denial of counsel, and we think the best description of that is something that when you look at the system, the scheme of criminal -- the criminal scheme that resulted in a conviction you say, that scheme cannot reliably produce a conviction in which we have confidence, and I would give you an example. For instance, the Tumey case.

You have a system in which the judges essentially are being paid piecework for convictions. You look at that system and you say, that can't really produce something that we are prepared to call conviction in the modern sense of the word.

QUESTION: Well, but what about a nonstructural error which can be clearly shown to have been harmful?

MR. BRYSON: Well, Your Honor --

QUESTION: That's certainly not worthy of reliance.

MR. BRYSON: Well, it may be that there are many things that happen during the course of a trial or in the

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guilty plea proceeding that would -- if you examined the record would give you confidence, or erode confidence in the reliability of the ultimate judgment, but the problem is that you impose at the sentencing proceeding an enormous cost on the system if you say you must search each of these records for something that would indicate lack of reliability. It violates basic principles of finality.

QUESTION: Well, but that's my basic problem with choosing the structural test, because in order to decide whether there's been a structural violation you're going to have to search the record. Some structural violations are only evident from the record, aren't they?

MR. BRYSON: Your Honor, we are -- and in this respect we adopt the Fourth Circuit's view. We're not talking about all of what this Court has called structural errors in the harmless error setting, we're talking about structural errors that go to the integrity of the structure of the criminal procedure that's being used. In other words, we're not talking about something that happens at trial that we would say, well, that really -- you can't assess this for harmless error.

QUESTION: I'm glad to hear that. You're not using it the same way we're using it in the harmless error setting.

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MR. BRYSON: That's correct. We're using it in a narrower sense. We're using it in something that much more closely approaches jurisdiction, as Your Honor noted, the traditional --

QUESTION: Mr. Bryson, are you taking this Court's precedent and trying to make sense of it, and that's how you get to this label, structural, that you put on it?

MR. BRYSON: Well, Your Honor, we're taking Burgett and trying to extrapolate from Burgett the principle for which we think it stands. The answer to your question is yes, I think it can be done, and I think it is something that each of the courts of appeals -- there are five, now, that have essentially come to the same view that the Fourth Circuit has done, have each followed essentially this path.

That is to say, Burgett stands for the proposition that if something is just, the kind of conviction in which you can say, the fix is in, from the beginning we can't have any confidence in the outcome of this kind of proceeding, then you say, that's something that can be reviewed. That can be collaterally raised at sentencing.

QUESTION: Couldn't Congress have followed a different assumption, because when Congress legislated,

you not only had Burgett, you had Lewis, and why isn't it reasonable to suppose that congress assumed that under our precedent it would be appropriate to overlook a constitutional defect only for the purpose of defining a class subject to a primary conduct rule, i.e., don't buy a gun, but that otherwise a conviction, a predicate conviction could be attacked just as the way it was attacked in Burgett or was attacked in Tucker.

MR. BRYSON: Your Honor, I don't think -- I have not been talking and I don't think that the petitioner is relying principally on what Congress did, the Armed Career Criminal Act, here. I don't think that the Armed Career Criminal Act authorizes any challenge at sentencing to a prior conviction. The language is clear. It talks about convictions. It -- the --

QUESTION: Then why do you concede a Burgett challenge?

MR. BRYSON: Well, because we think that the Constitution, by its own force, requires -- because of what this Court said in Burgett requires that you consider a challenge to a conviction which was uncounseled.

QUESTION: If we do not reach that specific --

MR. BRYSON: That is not a statutory question.

QUESTION: I'm sorry?

MR. BRYSON: That is not, in our view, a

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statutory construction issue. That is a pure constitutional question.

QUESTION: If this Court in Lewis had not expressly reserved Burgett, then I assume you would be arguing that there was no reason whatever to make an exception.

MR. BRYSON: Well, if this Court in Lewis had effectively overruled Burgett, then --

QUESTION: Or had provided an equally legitimate motive analysis without expressly reserving the Burgett and I guess the Tucker outcomes, you would argue for a Lewis analysis and say that that in fact -- a constitutional analysis and say that that was in fact the only one that was consistent with the congressional intent.

MR. BRYSON: I expect that we would. I would have to say, though, I don't think it's fair to say that the Lewis court reserved the question of Burgett. The Lewis court distinguished Burgett, and distinguished it in a way that would put this case --

QUESTION: Yes. Your language is better than mine. I --

MR. BRYSON: Well, but I think that it's important, Your Honor, because as we read the state of the law now, Burgett is still good law. Lewis does not, I

think, undermine Burgett to the extent that we would say that Burgett is just a dead letter.

QUESTION: Mr. Bryson, what you propose, structural in the sense of obvious structural -- I wish we'd get another word so we don't confuse it with our harmless error jurisdiction, but whatever you want to call it -- obvious-structural, hyphenated. That test, it seems to me, would make a lot of sense as a statutory test, as an interpretation of the statute, but I find it difficult to see why that should be a constitutional test, which is what you're posing it as --

MR. BRYSON: Your Honor, what we --

QUESTION: -- and it seems to me the constitutional test is whether the trial was fundamentally vitiated, so I can understand jurisdiction. No jurisdiction, as a constitutional test, but once you go beyond that, why should obvious-structural defect be more unconstitutional than less obvious-structural defects, so long as it's a structural defect?

MR. BRYSON: Well, for these purposes, Your Honor, one very important consideration to bear in mind. We are talking essentially at bottom here of a due process problem. Is it a violation of the Due Process Clause to consider a conviction of this sort without going through the process of doing a constitutional review?

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When you're looking at a due process issue like that, one consideration you have to take into account is, how much of a burden does it place on the system to have to engage in that kind of review, and when you're talking about something that is an obvious, on its face, just essentially voiding structural defect, then that doesn't put much of a burden on the system.

On the other hand, if you're talking about something to take the example here, like ineffective assistance of counsel, which it's true may in the appropriate cases be prejudicial, you are talking about something that is the most fact-intensive, the most burdensome kind of inquiry.

QUESTION: Well, but Mr. Bryson, not only may be prejudicial, must be prejudicial --

MR. BRYSON: Yes.

QUESTION: -- or there's no such claim, so it really is a contradiction in terms to talk about a harmless error violation of the right to counsel.

MR. BRYSON: I would agree with that.

QUESTION: Now -- but let me just ask one other question. You've spoken of the enormous burden on the system, and that is something we must of course take into account, but I'm puzzled because of the briefs. The other side says, there's been experience in a lot of circuits,

and there really was no significant burden on the system. Either it's a fairly obvious violation and they deal with it readily, or it's not. You argue there is an enormous burden. What is the empirical support for your statement that there is such a burden?

MR. BRYSON: Well, Your Honor, it is hard to bring empirical support to the Court. We haven't done a study. I have anecdotal evidence, but --

QUESTION: Because in all these cases the burden is on the defendant --

MR. BRYSON: That's right.

QUESTION: -- to make out a strong case that would persuade the sentencing judge.

MR. BRYSON: That's right, the burden is on the defendant.

Your Honor, what I think is happening, and this is, I'm afraid, in the nature of anecdotal evidence rather than empirical, but I think what's happening is that gradually defendants are becoming, particularly as these Armed Career Criminal Act cases come up more and more and the Sentencing Guidelines enhancement cases come up more and more, defendants are becoming more sophisticated and realizing -- and their counsel are, and realizing that there is a potentially fertile ground here for trying to disable the prosecution from using these kinds of prior

convictions.

These cases didn't arise very frequently for a while. Now, what you see is applications for -- or objections to prior convictions based on claims of ineffective assistance of counsel and invalidity of guilty pleas that come up very frequently, and particularly with respect to ineffective assistance of counsel, are quite difficult to rebut.

Now, I think --

QUESTION: Well, but they're also quite difficult to put forward.

MR. BRYSON: Well, it isn't that hard to, Your Honor, because consider this case. Who -- this is a case in which the defendant is saying, I was misled as to what the elements of the crime were here, and particularly with respect to the possibility of my having a defense, the defense of intoxication.

That is the easiest thing in the world to claim. You simply say, well, my lawyer told me I was --

QUESTION: Well, but here the transcript supports it, too.

MR. BRYSON: Well, your --

QUESTION: It doesn't happen every day that the transcript actually recites those facts.

MR. BRYSON: Well, but Your Honor, that I think

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is a perfect demonstration of why it is that this is a potential -- a real potential sinkhole for district courts to get into.

Let's talk about the transcript and what it says about this issue of drunkenness, if I can go to the facts of this case --

QUESTION: Sure.

MR. BRYSON: Because what went on here is, the defendant was asked by the judge, has your lawyer told you -- and I can't remember the exact words, but something like, about the defense you have in this case, which sounds like the judge is asking, have you been informed that you have a way out here, and not surprisingly the defendant said no, and then the judge pursues that a little bit --

QUESTION: -- and then he talks to his lawyer again, and comes back and says he's satisfied, so I think on this transcript you might well win.

MR. BRYSON: That's right, and something else happens which I think is very important here, and again it pertains to how much work it is.

QUESTION: But the thing that troubles me is, they shouldn't even read these transcripts.

MR. BRYSON: That's right, Your Honor, because --

QUESTION: When -- when

MR. BRYSON: -- time and time again the pattern's going to be the pattern that we find here.

QUESTION: They should read presentence reports, they should read all sorts of material at the sentencing proceedings, but not spend 15 minutes reading the transcript of the prior guilty plea proceeding.

MR. BRYSON: Well, Your Honor, I -- it is --

QUESTION: That doesn't strike me as an enormous burden. That's what I -- that's really what I'm --

MR. BRYSON: Your Honor, one of the problems is that in many, many of these cases there will not be a transcript of the prior proceeding. In this case there happens to have been, but in so many guilty plea cases there's never an appeal. There's never a transcript prepared.

The guilty plea is evidenced by a certified judgment of conviction with a notation, pled guilty with counsel, and that's it, so in the great bulk of cases, all you're going to have is the defendant standing up and saying, my lawyer didn't tell me everything that I needed to know, or lied to me about what sentence I was going to get.

And then you're going to have the defendant coming up and saying, well, I don't remember -- in fact,

I'm sure I didn't get the right kind of Boykin warnings, because I remember clearly that the whole thing was over in 2 minutes, and the judge is not going to remember, and the defense lawyer in all likelihood is not going to remember, and in many of these cases it's going to be a case that comes from a State that's six States over, and in which the burden of getting all the evidence, even if it's available, together would be quite crushing.

So it's true that reading the transcript might only take 15 minutes, but getting the transcript together and getting the witnesses together is a very burdensome proposition.

QUESTION: In this particular case, in the places where the convictions were originally entered, it was too late to seek any further remedy. That is, there would have been first a motion to withdraw a guilty plea if we're talking about a guilty plea, and then a direct appeal, and then a collateral attack.

At this stage where the Armed Career statute is being applied in another forum, is it clear that in this case the avenues were closed off in the places where the convictions had been entered?

MR. BRYSON: Your Honor, it's not clear. As to the 1985 conviction, which is the one that was challenged for ineffective assistance of counsel and involuntariness,

it is our reading of the timing that a conviction -- a challenge could still have been brought in a State and then ultimately the Federal courts based on the continuing custody under the 1985 conviction.

The 1989 conviction, it is true would not have been open as we read the Maryland law to a collateral attack, and of course it was final, so there couldn't have been any direct attack.

On the other hand, Maryland does have quorum nobis, and it isn't clear that the kind of claim, at least if the claim is that the defendant was deceived into pleading guilty -- that's not precisely the claim he makes, but if that is the claim he would like to make, that may well be open for quorum nobis consideration.

QUESTION: I take it you wouldn't want us to decide the case on that ground.

MR. BRYSON: No. No, not at all, Your Honor.

QUESTION: It's okay so long as the -- it was still open.

MR. BRYSON: That's right. We think that the simple constitutional principle is that with respect to all claims of error except for Burgett and closely associated, closely allied errors, that there is no constitutional right to have those claims relitigated at the sentencing hearing, and I think it's important --

QUESTION: Well, you would agree, would you not, that ineffective assistance of counsel is closely allied to the deprivation of counsel. It's the same constitutional right.

MR. BRYSON: It comes from the same basic source, of course.

QUESTION: And it requires the same showing, that you were prejudiced by not having a lawyer.

MR. BRYSON: I don't think it requires the same showing, Your Honor. I'm sorry, did you say ineffective assistance and denial of counsel?

QUESTION: Yes.

MR. BRYSON: The denial of counsel doesn't require any showing of prejudice. You are -- you are --

QUESTION: You presume prejudice in that situation.

MR. BRYSON: Well, conclusively.

QUESTION: But you have the additional burden in the above case that you must show the actual prejudice.

MR. BRYSON: Yes, and that is a huge difference, because what it means in practice --

QUESTION: If you show it, is there any difference?

MR. BRYSON: Yes, I think so.

QUESTION: Oh.

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MR. BRYSON: And the difference is that --

QUESTION: Haven't we taken the position in Strickland that there wasn't? Didn't we say the one is equivalent to the other?

MR. BRYSON: Your Honor, what you said in Strickland is that the ineffective assistance of counsel, if you are effectively denied effective assistance of counsel, that constitutes a violation of your right to counsel, there's no question about that, but it is very different, and in a practical sense I think it's important to focus on the difference, between saying you had no lawyer and saying that while you had a lawyer, your lawyer made several critical mistakes in the course of a trial. In other words, you could have the best lawyer in the world --

QUESTION: Several critical mistakes that caused you significant prejudice.

MR. BRYSON: Exactly. Exactly. Now, that's got to be the claim.

QUESTION: If I had had no lawyer, assuming the court was aware of my right to one and I hadn't waived, I would have a right to competent counsel, so in a funny kind of way you could argue I would have been better off to be standing there alone than to be standing there with incompetent counsel on your view of what I can attack

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later.

MR. BRYSON: Well, Your Honor, you -- in a sense you would be better off in that you would have a claim that would be cognizable which you wouldn't have had otherwise, but there's -- to return to the question of whether there is anything to the distinction between ineffective assistance and complete denial of counsel, and this case again is a perfect demonstration of the great difference, this 1985 proceeding, which is the one in which the ineffectiveness claim is being raised, was -- frankly it was a very well run guilty plea proceeding.

The district court went on for many pages eliciting the waivers, and there was an argument made, an effective argument, there was an effective plea agreement for the defendant, and in fact what emerges from the transcript is that the strategy that was obviously the product of consultation between the defendant and his lawyer in that case was not to go the route of saying that I was so drunk I couldn't possibly form the mental intent necessary for burglary, because under Maryland law that is an extremely difficult standard to meet.

The strategy was to take the opposite tack and say that although I'd been drinking a little bit, and that should be viewed in mitigation, what really should be viewed in mitigation is the fact that this was not some

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third party victim's house that I went into just to steal things, I actually know these people, and they owed me money, and I went in there really to essentially self-help collect on a debt.

Now, that's not a legal defense, but it was said in mitigation. That's the strategy that they had --

QUESTION: But what it all boils down to, isn't it, is what Justice Stevens said a little while ago, the Government's probably going to win this one.

MR. BRYSON: That --

QUESTION: It's not a case that illustrates that a denial of counsel in fact is not quite so bad.

MR. BRYSON: Well, Your Honor, what it does illustrate, again, I think is how difficult it is to determine whether in fact there was in a case like this an ineffective counsel.

QUESTION: Oh, it may be difficult or it may not. I mean, that wasn't my point, but my point is, why, if we assume there has in fact been a denial -- i.e., including prejudice -- why we are not bound to equate the two.

MR. BRYSON: Well, I think the reason comes down to, if you want to put it this way, it comes down to the fact that we've got a due process question here and we're distinguishing between two classes of violations based on

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the -- if you want to call it administrative convenience. In other words, the difficulty to the courts of trying to assess one type of error and another.

QUESTION: But your answer -- and I think, you know, it may be the right answer, but your answer is basically a confession and avoidance answer. Your answer is, well, we don't have a principal basis for distinguishing them, but we have a practical reason for not treating one the way we treat the other --

MR. BRYSON: Well, I think it's --

QUESTION: -- and that's what we'd have to say, isn't it?

MR. BRYSON: I think the principled basis is found in the practical distinction. I mean, I don't think practical distinctions are on principle.

QUESTION: You're a good common law lawyer, Mr. Bryson.

(Laughter.)

QUESTION: Mr. Bryson --

QUESTION: Do you agree -- excuse me.

QUESTION: On the practicality, would you review for us what Federal circuits are allowing challenges for ineffective assistance?

MR. BRYSON: Well, Your Honor, it's complicated. I will a little --

QUESTION: The sentencing enhancement.

MR. BRYSON: There are several circuits -- there are several different balls in the air here. One is the question of whether the circuit allows challenges as a matter of construing the Armed Career Criminal Act, and there are, I think, four -- at least four circuits that say yes, the Armed Career Criminal Act must be read to permit any challenge, including ineffective assistance of counsel.

There are other circuits that permit the challenge under the Sentencing Guidelines. Now, that's in flux, because the guidelines have been modified a few times, moving clearly in the direction of saying no, no challenges authorized by the guidelines. There are other circuits, principally the Ninth Circuit, and I think it's fair to say that the Ninth Circuit is really the only circuit that's clearly adhered to the point that as a constitutional matter you are entitled to raise all constitutional challenges at sentencing.

There are five circuits in which the courts have said as a constitutional matter you are not entitled to raise any of these claims, except for the right of counsel and closely allied claims, not including ineffective assistance of counsel, so it's a little hard to read the scorecard, but that's what it comes down to.

QUESTION: On this question of the distinction between denial of counsel altogether and their getting an incompetent counsel, do you agree with the Fourth Circuit that so long as the lawyer is present and is physically breathing that's about all you need?

MR. BRYSON: Well, Your Honor, I think that's -- the short answer is yes, I think that's right. I mean, there are cases in which you could have been assigned a lawyer, and you would still be prepared to say that you have been totally denied effective assistance, the lawyer's been disbarred, for example.

QUESTION: If we were writing the opinion, would you suggest that we acknowledge the possibility of gross incompetence?

MR. BRYSON: No, Your Honor, I don't think it's a question of how incompetent. I think the question would be whether the lawyer was really not there. If the lawyer missed every day of trial after the arraignment, for example, just didn't show up, then the fact that you had a lawyer appointed for you is not to distinguish your case from a case in which somebody didn't have a lawyer appointed for him.

If you get into distinguishing between incompetence, serious incompetence, gross incompetence, then I think you have invited the kind of inquiry that we

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think the Constitution does not require, and that practical considerations would treat as being just an enormous burden on the sentencing process.

QUESTION: Mr. Bryson, supposing the district court in this case took all these convictions into consideration, as the court of appeals said it could, and the defendant is then sent to prison for a number of years. Under our Malang decision, could he then in Federal habeas challenge one of his earlier convictions?

MR. BRYSON: Your Honor, our reading of Malang is that he could not, that those convictions he would not be in custody on those prior convictions, although there's language at the end of Malang that leaves open the question of just how you can challenge conviction A when you have been -- when that has been used to enhance your sentence for conviction B.

If I may say one more word about the practical impacts and the burden of this, I think it is an increasing practice that we see increasing numbers of cases come in, and just recently I saw a case in which a defendant had 17 prior convictions and challenged every single one of them, and it is not limited -- this problem is not limited --

QUESTION: Did he succeed on any of his challenges?

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MR. BRYSON: He actually got a long opinion out of the court of appeals in which there was a split opinion as to whether he should have been granted relief or not, but the --

QUESTION: On 17?

MR. BRYSON: The point is that the mischief here -- well, a number of them were not violent crimes

QUESTION: He had to win on 15 in order to get under the three, didn't he?

MR. BRYSON: He managed to knock a number out on the ground that they were not violent crimes, others on other grounds and so forth, but he got down to a small number and attacked those on constitutional grounds.

But if I can just make one further point, this is not a principle that -- if this Court adopts the principle petitioner seeks, that's limited just to enhancement proceedings. It would affect every sentencing proceeding in which somebody wants to use a prior conviction just as a factor going to whether the person should be sentenced in a particular way.

It also would affect, I assume, whether a prior conviction can be used for impeachment, so that when a prosecutor stands up after the defendant has testified and says, I want to impeach this guy with his prior conviction, he would be able to say, oh, no, I had a bad

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lawyer, you can't use that, and you'd have to have a proceeding right there to decide whether or not the lawyer in that other case was ineffective.

I think one other area in which the same practical problems would arise is probation revocation. You've never been able to challenge your initial conviction in a revocation proceeding, but I assume that if the defendants are correct here, the defendant is correct, then you would be able to in a case like this.

QUESTION: Thank you, Mr. Bryson.

Ms. French, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF MARY FRENCH

ON BEHALF OF THE PETITIONER

MS. FRENCH: I'd just like to briefly point out that the court of appeals decisions are cited on pages 13 and 14 of our brief, and there are eight circuits that have uniformly allowed challenges under the ACCA. I think that a number of the cases that Mr. Bryson was referring to arose under the Sentencing Guidelines, and there are different considerations under the Sentencing Guidelines, including the fact that there are departure provisions available, and there is also guidelines language that governed whether challenges were allowed, at least up until recently.

Another difference between the guidelines and

ACCA cases is that there is no increase in the statutory maximum in the guidelines context, where there is in this case.

QUESTION: What about the infirmity of the conviction for purposes of impeachment or, as Mr. Bryson just brought up, talking about probation, these other contexts, where it would be to a defendant's advantage to show that a prior conviction was infirm?

MS. FRENCH: A Federal court's decision not to rely on the prior conviction for a sentencing enhancement would have no impact on these proceedings. There would be no judgment as to whether the conviction was or was not constitutional.

QUESTION: But if it's open in the one case, why shouldn't it be open in the other to say, you can't use that conviction to impeach me, it's an invalid conviction?

MS. FRENCH: Your Honor, I think because that would not be such a direct consequence of the prior conviction as use of it would be in Federal sentencing.

QUESTION: Wouldn't it depend on whether we decide it on a constitutional ground or a statutory construction ground?

MS. FRENCH: It could depend in part on that, but I also think that the decisions in Burgett and Tucker are limited to enhanced sentencing and do not address

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other collateral uses of prior convictions.

QUESTION: Do you think Lewis speaks to that problem?

MS. FRENCH: Your Honor, I don't believe that Lewis does speak to that.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. French.

The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)