Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

DENNIS MULLENE MOON,

Petitioner;

vs.

STATE OF MARYLAND,

Respondent.

Docket No. 267

Place Washington, D. C.

Date April 22, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

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The above-entitled matter came on for argument at 1:56 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: You may proceed whenever you are ready.

ARGUMENT OF ROBERT ANTHONY JACQUES

ON BEHALF OF PETITIONER

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

I am Robert Anthony Jacques, attorney for petitioner no. 267. I believe a brief statement of the chronology of events would be in order before we start the issues presented to me by the Court in this case under the instructions of last June 23.

The petitioner in this case, Dennis Mullene Moon, was arrested on June 2, 1964 and was tried on December 17, 1964, convicted on January 7, 1965 for the crime of armed robbery in the circuit court for Montgomery County, Maryland.

On October 23, 1965 the Court of Appeals of Maryland decided Schowgurow vs. Maryland. As a result of that decision, they held that limitedly retroactive to include petitioner in these proceedings and said that he could avail himself of that decision and take a new trial, if he so desired, since his conviction had not yet been made final.

He, in effect, did take a new trial on June 6, 1966. On June 7, 1966 he was convicted of armed robbery, assault with intent to murder and larceny.

It is the irony of this case that the second judge chose to increase the sentence for the same charge for which the petitioner had been convicted in both cases, that is armed robbery, and then impose two suspended concurrent 10 year sentences on the other charge.

I say in all frankness that had Judge Pugh run the other sentences consecutively and left the sentence for armed robbery at 12 years, I would not be standing here today; I would really have no case at all.

Be that as it may. Judge Pugh did see fit to increase the sentence on the identical charge, for which the petitioner had received 12 years, to 20 years at his second trial.

This Court, when it granted certiorari last June, ordered me to argue the question of retroactivity of North Carolina vs. Pearce.

Q May I ask you before you go further, credit was given by the second judge?

A Yes. Actually Judge Pugh gave the petitioner more credit than he had received at his first trial. Judge Pugh ran the sentence back to the date of his arrest, whereas, the first judge ran it back to the date of his first sentence only. So, in effect, Judge Pugh gave him another 7 months credit.

Q So there is no issue here as to that aspect of Pearce and Simpson?

A There is no question of credit; that is correct, Your Honor.

Q Full credit was given?

A Full credit was given; that is correct.

If I may proceed, Your Honor, as to the question of retroactivity. May I state at the outset that I am not urging the Court, as a practical matter, that every decision of this Court should be made retroactive. And I am not here to push that argument.

My argument, of course, is only that, under the facts of this case and the criteria which this Court has outlined -- particularly in Stovall vs. Denno, Desist vs. United States -- that the three criteria of the purpose of the new rule, reliance on the old rule and the burden on the administration of justice fully justify a completely retroactive effect to this case before the Court today, that is Moon.

I would like to say further, Your Honor, that I do not believe that there is, in effect, a new rule. So that the question of retroactivity, I believe, is, at least, that this is not a retroactive case, in effect. I would say to the Court that North Carolina vs. Pearce was a case of first impression to this Court. And I intend to argue later to that effect; that it is not any change in the law of the United States. It is certainly, in petitioner's opinion, not a change in the law as expounded in United States vs. Ball or Stroud vs.

United States but was a new case.

I would also state that, under the facts of this case the three criteria stated -- for instance, the purpose of the new rule in this case, as I understand it, is to allow a free and uninhibited right to appellate review in the state and federal courts of the United States.

Certainly, this purpose -- and the Court has so stated in Stovall, I believe -- that this purpose is controlling unless the questions of reliance or burden are such as to overcome it. I submit to the Court that those factors are not of such a factor.

I would say this, as to reliance, that the Court in Benton, for instance, talked about collateral estoppel. I would say, first, the state had no old rule to rely on. I will approach that later. Since they had no rule to rely on, even if they did rely on the Maryland law -- and, of course, they would argue that -- there was no controlling United States case for them to rely on. Assuming that there were, under the doctrine of estoppel, they did not change their position to their detriment because of this decision.

If the Court will note at page 38 of the state's brief, they concede that of the 85 persons who were retried -- that is reconvicted under Schowgurow -- 11 of them received increased sentences. Projecting, as a practical matter, Maryland's population is 4 percent of the national population;

that would mean, approximately, 550 prisoners in the state prisons in this country would be resentenced.

Q Do you think this period of time and this number of people is sufficient to let the law of probability have any meaningful exercise? This is just a very short period of time and a very small place.

A Well, Mr. Chief Justice, Schowgurow was decided in October, 1965. The state's brief was submitted in, approximately, September, 1969. That is 4 years. There were, I believe 221 cases; the state had some figures which they put in their brief. I don't see, frankly, where the figures will change with time, at all.

Q Well, not the figures, perhaps, in Maryland. I am talking about your projecting this to the 49 other states.

A Oh, well, very frankly, Your Honor, I will concede that I borrowed a copy of the brief in North Carolina vs. Pearce, and petitioner for respondent there stated that perhaps up to 70 percent of some cases in North Carolina had received increased sentences. So, perhaps, my figures are at least subject to challenge.

But, I submit, that the number of cases involved in the state courts cannot be that great -- and particularly the burden on any one state -- as to justify a reliance on a rule which, in my opinion, Your Honor, does not exist in the first place.

Q Well, the reliance, I suppose, was that until Pearce and Simpson any state felt free on a retrial, any trial judge on a retrial of somebody who had been previously convicted, felt entirely free, because that was the rule; there was an absence of any other rule.

A No, Your Honor ---

Q He felt entirely free to sentence the person before him who had been convicted just as though this were a new case.

A Please the Court; I think it goes futher than that. I know in Maryland courts, and I believe the Maryland court in my case, relied very heavily on Stroud vs. United States as authority for the proposition that this Court has ruled that there is no constitutional prohibition against increase of sentence at the trial.

I do not so read Stroud; nor do I read the United States vs. Ball.

Q How do you read Pearce and Simpson?

A I read Pearce and Simpson to have approached the prohibition against increase of sentence, with the exception which the Court outlined as to conduct subsequent to the first trial.

Q Pearce and Simpson said there is no absolute and constitutional prohibition against a longer sentence at a new trial, didn't it?

A That is correct; they said --- Well, as I recall, there was no flat, absolute prohibition; I agree with it to that extent. But the point that I originally urged in my writ of certiorari -- that is point 3 of this argument -- is that that prohibition be made, in fact, a flat prohibition.

Q Well then, you are saying that Pearce and Simpson were wrong and the dissenters, in that case, were right.

A Well, I hate to say it, Your Honor; I am saying that the Court did not go far enough in North Carolina vs. Pearce, yes.

Perhaps, as to this question of reliance: I know that the Court stated at some length in Pearce that they did not wish to overrule the long line of cases in Ball and Stroud. As I read the cases cited by the Court there, I do not believe that they stand for the proposition which the Court feels it does, at least the plurality opinion in Pearce says that it does.

I have read the briefs in the Stroud Case, and counsel was arguing there -- as it is in my brief -- that, since Stroud had been put in jeopardy at a former trial, he could not even be retried again for the same offense, that is, murder. And I say, with respect, to the Court that that is exactly what the Stroud case stands for. I believe Murphy vs. Massachusetts, Ball vs. United States all stand for roughly that proposition; that is that the fact of an acquittal or the

fact of a reversal does not, in any way, prohibit retrial for the same offense.

I am certainly not saying that to this Court. That is an untenable argument. What I am saying is that the Court, until Pearce, had never decided the question of increase in sentence at retrial.

As to the question of ---

Q I thought it was in Stroud that the man was sentenced to life imprisonment the first trial and a death sentence the second. Stroud was the ---

A That is right, Your Honor. And, of course, his case came back here ironically in 1960, some 40 years later. As I recall, in May of 1960 he received the death sentence. He then appealed and got life the second time. And then, on the theory of pushing his luck I suppose, got a third trial and got death again.

It was at that case that his counsel urged that,since he had already been put in jeopardy for his life, he couldn't be tried again, the third time, at all. I have read Stroud, and I am convinced that that is what this Court was deciding in Stroud; that there was no reason not to retry him the third time.

If I may proceed then as to the question of the double jeopardy argument. As to double jeopardy, I know that this Court has, in Pearce, decided that the double jeopardy

argument is not applicable. May I say, respectfully, that a close reading of the language of the Fifth Amendment and of the studies since then -- and, in fact, the first draft of James Madison's article for the Fifth Amendment, in which Mr. Madison stated that there should be no more than one punishment nor one trial for the same offense. Unfortunately, as I understand it from the artical, there was so much confusion as to whether punishment means he couldn't be retried -- exactly the Stroud question -- that Mr. Madison was forced to change his original language.

I think, very frankly, Your Honor, that the language -- the cases which I feel are applicable to this case are not Ball and not Stroud but ex parte Lange in 18 Wallace and United States vs. Bentz. This Court said, in ex parte Lange, that the reality of trial is not the trial itself, but the punishment.

And I might say to the Court -- I have only been in practice of law 7 years -- but I have never had a case in which the overwhelming desire and concern of the prisoner was not the punishment involved.

I know that there may be some cases where, because of security clearance or professional reputation, the man would do anything to avoid a conviction. But, as a practical matter, I submit -- at least in my experience -- 90 percent of the appeals that go to the state and federal appellate courts in this country are in some way related to the issue of punishment.

I think that is the ultimate reality of criminal law.

I think, very frankly, to separate double jeopardy from trial, from double jeopardy as far as it concerns the sentence, is to incorrectly judge, in my opinion, the clear language of the Fifth Amendment. Because it says, "and shall not twice be put in jeopardy," not by conviction, but of "life and limb;" that is: punishment.

I submit, Your Honor -- the state has raised several questions about: Well, if you extended it to a flat prohibition, what would happen? You would have everybody appealing. I have statistics, Your Honor, that show that in some circuits the rate of appeal is approaching 90 percent now.

Under the uniform code of military justice for a crime involving more than one year imprisonment, you have 2 automatic reviews; automatic, you don't even have to request them.

I submit further that the state has, apparently, been saying all along that the second trial judge sits de novo, and, accordingly, he has the right to substitute his judgment for that of the first judge, because the first judgment has ceased to exist.

If I recall the language of the Court in Pearce is that the first sentence, insofar it is not conserved, becomes a nullity. I submit, with all due respect, that this nullity argument simply is not, cannot be distinguished from the

argument in Pearce at all. It is not consistent with the rest of the argument in Pearce.

I cited, for instance, in my brief -- and I would very much like the State of Maryland to answer this question -- Reeves vs. State, 3 Md. App. 195, where the defendant had served some 6 years of a sentence of 20 years, if I recall. He then got a new trial and got 20 years imprisonment.

The court said, "Well, we agree that this is a de novo proceeding; we agree that the slate has been wiped clean; we agree that the former sentence is a nullity." But you still can't sentence a man 26 years on a 20 year maximum charge.

As I said to the Court of Appeals, when I argued this, I said, "I would like the court to explain the distinction between its rationale in Moon and its rationale in Reeves." If the former sentence is a nullity, and it ceases to exist, and the man gets another maximum sentence, it is perfectly proper. Now this is the logical extension of the Reeves decision.

The Court of Appeals of Maryland declined to hear that case. The state asked for certiorari, and they simply did not take the case. I will say, when I was arguing the case, one of the judges on the Court of Appeals said he saw nothing wrong with that argument. The man got a de novo trial and got another 20 years and wound up serving 26 years on a 20

year charge; that was perfectly all right, because the former sentence was a nullity.

I submit with respect to the Court that you cannot consider a sentence as a nullity. It is there, and it is why most appeals are taken.

Now the courts in the State of Maryland have said that -- and they have cited from other cases -- that, on appeal, the Court of Appeals will reverse a sentence if it is excessive and they feel that it violates liberty and due process.

Your Honor, my set of the Maryland reports go back to 1682, and they have recently stated that there is no case on record in which the Court of Appeals of Maryland has ever reduced a sentence. In fact, I submit to the Court, to the best of anyone's knowledge in the entire, almost 300 years of the appellate procedure in Maryland, not a single case has ever been reversed because the appellate court felt that the trial judge had been too harsh.

In fact, in the last few years the Maryland legislature has seen fit to establish a new procedure for appellate review of sentence under rule 762 of the Maryland Rules of Procedure. This involves a three-man bench, of which the sentencing judge is one, and he may then -- they may then either increase the sentence, leave it alone or decrease it.

It seems to me that this is the ultimate issue. The State of Maryland has now recognized that there is a division

between the appeal of the trial and the appeal of the sentence. I am asking this Court to recognize that distinction in Pearce.

I am asking this Court to accept what I believe was the logical extension of Green vs. United States and the very fine article by Professor Van Alstyne about this problem, which I have cited in my brief.

And in Green -- If the Court will accept the idea of implicit acquittal insofar as the trial goes, then I see nothing wrong -- and, in fact, I think it is perfectly logical to say that there has been an implicit acquittal insofar as any higher sentence goes.

In other words, that court has established the maximum sentence, and, upon retrial while there may be another sentence, obviously, it cannot exceed that valid sentence.

I am asking the Court, in other words, to face what I consider is the reality of appeals: That almost every appeal is somehow an appeal of the sentence and that, because our courts do not recognize that on appeal, somehow error has to be found.

I would venture to this Court that, if you promised every prisoner in any jail in the United States, that he would be released if he dropped his appeal, I would venture that 90 percent of them would drop the appeal immediately.

I would venture further that, if you released him and said that you can go ahead with your appeal, it doesn't matter,

they still would drop their appeal. Because we are faced here -- and I know this Court is facing other cases; we just heard one about -- I think that the sentencing area is the most sensitive area which this Court must now resolve. I know that there is a capital punishment case set; I know that North Carolina vs. Alpert is set very soon, or has been already argued.

I think the courts -- particularly this Court in Pearce -- have finally faced this entire area of sentencing and punishment, and that is the ultimate reality of the law of this case and the law of every case. There is no good reason not to apply North Carolina vs. Pearce retroactively.

What is going to be the burden on the administration of justice? Almost nominal. Not one guilty person is going to be turned loose. If every prisoner in the state came nder this rule -- and I say it is only 11 -- if every prisoner came, what would happen? He will be brought back to the sentencing court and sentenced in accordance with this case. I do not consider that an undue burden. Not one person is going to go free because of this case.

As to reliance upon the old rule, we have already discussed that. I submit, very respectfully, there is no old rule. So that is why I contend that the question of retro-activity does not even apply here. Because I know in Desist the Court talked about changes in the law and a clear break with the old law, but there is no old law to break with in this

case.

Please the Court: I am saving some of the time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jacques.

Mr. Borgerding.

ARGUMENT OF EDWARD F. BORGERDING

ON BEHALF OF RESPONDENT

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

I would like to accomodate my brother and inform him, while he made the statement that he does not know of any case in which the Court of Appeals -- maybe he was limited to the Court of Appeals in Maryland -- but as far as the Court of Special Appeals, which is an appellate court, they did reverse the Reeves Case simply because they felt that the trial judge exceeded his authority, and it possibly foreshadowed this Court's decision as far as credit for time served.

I think the Pearce Case held that, while the sentence is a nullity on the first conviction, the time actually served cannot be a nullity. This is exactly what the Court of Special Appeal held, not in those exact terms.

But in that case, since Reeves had been given a life sentence, he had spent 6 years in prison. The second time around, when it was reversed in the federal court, he received a 20 year sentence; it was a crime of rape. The

judge gave him 20 years but did not take into consideration the fact that Mr. Reeves had actually spent 6 years in jail.

And so, therefore, the Court of Special Appeals held that this was, in effect, increasing the statuatory sentence of 20 years that Reeves was entitled to, and they reversed the case. And our Court of Appeals, for their own reasons, did not grant cert.

Mr. Jacques is correct. The state took a cert in that case, insofar as we were trying to resolve the question of Moon, which was pending in the Court of Appeals at that time, Reeves and also another case, Williams vs. State, dealing with jail time, that is, the time the defendant spends in jail pending the trial as differentiated from sentence time.

As to the statistics that we quote on page 38: At no time do we mean to infer that this 11 increased sentence applys to all retrials in the State of Maryland. It is limited, as indicated in the brief, only to Schowgurow cases, not to cases that have been reversed because of double jeopardy problems, evidentiary problems and a variety of reversals that come through.

This is only limited, and it is only entered into -- the statistics of finding out this to contradict this pragmatic philosophy that judges of the second trial will vindictively -- systematically is the word that is used in the law review article, the Duke Law Journal -- systematically would increase

sentence.

This would indicate that in Maryland, under Schowgurow, that out of the 85 cases that were able to come up with retrials, 61 got a decrease in sentence. That is 72 percent. Incidentally, this was not figured on the sentence itself, because that is only one consideration. To determine whether a man got a decrease in sentence you must determine the date of his first sentence to make sure that the second sentence covers that same period of time.

This was figured on that basis. Someone could get a lesser sentence but, in effect, serve more time if he did not get credit for time served.

I think the question here -- in view of the Pearce decision by this Honorable Court -- the question before us today is based on the premise that the Pearce court held that, on a retrial, a man can get a heavier sentence. There were two problems there. One was credit for time served. The other was the fear of the vindictiveness on the part of the sentencing judge.

Therefore, I think it is incumbent to question before this Court today -- one of the questions is whether the trial record of the second trial would support the fact that Judge Pugh, the sentencing judge, had ample reasons or was his sentence -- not necessarily justifiable, though that could be a question of debate -- but whether it was given in

conformity with the evidence of that particular case.

Certainly, it has been the law of Maryland at all times, since 1896 in the Mitchell Case, that if a judge sentenced for an improper motive, that sentence should be set aside. We would say that a vindictive sentence on the part of the judge in penalizing a man for taking an appeal is certainly an unworthy motive and should be set aside.

While no question has been raised as to the guilt of this particular man, I think it is essential that a factual outline of the crime should be brought to the attention of the Court. This was a prosecution for armed robbery and assault with intent to murder and larceny of a female hardware clerk, who was on her way to deposit money in the bank. This was in broad daylight in the shopping center just to the northwest of here.

As she was walking to that bank, she was attacked by the defendant, Moon. The evidence will indicate that he struck her and beat her to the ground with a lead pipe that he had fashioned the night before by putting tar paper around it.

He was a former co-worker of the victim. He knew the victim; the victim knew him. So it was essential to the operation of this crime that she could not be able to identify him. And he was successful, because the beating was so severe that this woman could not identify Moon at the first trial and

could not identify him at the second trial, 2 years later, because she was suffering from amnesia brought on by this brutal beating about the head.

The judge at the first trial had before him the following: He had a witness that appeared, this victim, who said that she couldn't remember any of the details. This was six months after the crime. She had lost her memory, and all she could tell them was the name of her physician. The black-out on this young lady was from a five day period, the day before to around four days thereafter the crime.

She couldn't remember or give any details. So the first trial was limited to a description of her injury by people that found her lying on the sidewalk.

In addition, after the evidence -- it was a jury trial that took 2 days -- the defendant, when he took the stand in his own behalf, admitted that he had made the weapon. He also admitted that he was there at the shopping center. He admitted striking the lady. In reading the record, you can come to the conclusion that there is a tone of remorse and regret as he stated this, and that he was sorry that he had hurt her, that he liked her and he did not want to hurt her.

Q Now, this is in the first trial, isn't it?

A Yes, sir. And the point in bringing this out is to the difference in sentence. All judges vary, or not all, but there is a disparity in sentencing. It is unfortunate that

as long as we have human beings to sentence people, rather than computers, we are going to have disparity of sentences.

So Mr. Moon was convicted and got 12 years. Then, as Mr. Jacques has indicated, where he cited the chronological order, it was reversed because of Schowgurow.

Now, what took place at the second trial? The second trial, 2 years later, the woman comes in, and she testifies again -- and she has continued to have amnesia as to this 5 day period -- she testified that she is still under the doctor's care -- 2 years later, still under medical care.

At this trial a doctor appears, and he testifies as to the medical description of the terms that she was suffering, among other things, a cerebral concussion.

At this time -- this is a jury trial; it took 2 days incidently -- at this time Moon did not take the stand as was his privilege. At the conclusion of the trial, the jury found him guilty, guilty of armed robbery, guilty of larceny, and guilty of assault with intent to murder. Assault with intent to murder was not brought at the first trial.

When Moon was asked by the court, "Do you have anything you would like to say before I enter sentence?" The court asked defense counsel whether they wanted pre-sentence report, and that was turned down; they wanted sentence then.

Moon took the stand and testified as to why the court should be lenient was because he did not commit the

crime; he was not there and he denied hitting the woman. The court wasn't chagrined at this; it didn't know.

The defense counsel -- if you will read the record -- said, "Well, didn't you say at the first trial that you were there, etc. and so forth?" To which he denied it. Then he said that he was high on narcotic drugs at the time of the first trial. And I would like to add, a pain-relieving narcotic drug, because he did have some difficulty with his leg.

Then the court questioned him about this.

Q I didn't get that. Some difficulty with what?

A He had some difficulty with his leg, Your Honor. He maintained that he was taking this narcotic drug for the pain in his leg. His leg subsequently was amputated, so he apparently did have a problem. But there is nothing to indicate that he had any drugs at the time of the trial.

The court then questioned him about this evasive manner of whether he remembered committing the crime or not, and he was very vague about the party the night before and so forth.

It is on that basis that the sentencing judge had to decide what sentence should Mr. Moon receive. It is on the basis of his record. His record did come in; he had been convicted previously on 2 or 3 offenses. In the trial itself -- the evidence -- it was an atrocious crime, and then plus the fact that after 2 years in prison, Mr. Moon has not indicated

any rehabilitative signs, at all.

Q Is that in the record?

A I am characterizing it, but it is indicated by the fact that he denied committing the crime, when he is on questioning as to sentencing in his second trial. As to the first trial, there is a judicial confession. Incidertally, at the trial -- and the record vindicates this -- the state sought to put the judicial confession in. And the trial judge refused to allow the state to put the judicial confession in, and so it was excluded.

Q Was there a plea of not guilty at the first trial?

A Both times, not guilty. Both of them lasted 2 days.

Q Convictions in both cases?

A Yes, sir.

Q Except in the second case it was for additional charges?

A And I would like to point out here, to make the record clear: The only sentence that Mr. Moon appealed was the armed robbery; he did not appeal the other two sentences.

Q This is the thing that puzzles me. In the second case was there a trial on an additional charge of larceny, which did not appear in the first case?

A Your Honor, in the first case, there was a

charge of larceny. This is the Benton situation, no two ways about that. In the first trial the sixth count was larceny. But for some reason, in reading the record, the court and the counsel got it mixed up, and they called it a receiving stolen goods. And the judge said, "Well, what are you going to do? There is no evidence of receiven stolen goods." So the state said, "We'll abandon the larceny count." So there was a larceny count in the first trial, but it was abandoned after the trial.

Q Was there any punishment imposed for that in the first sentencing?

A No, sir. It was abandoned by the state.

Q The second judge's affidavit, which seems to indicate that he rested in part on the fact that there was an additional criminal act in the second trial ---

A Yes. The second trial was assault with intent to murder. This indictment was not brought at the first trial. What I am saying is that the first time you had an armed robbery charge with 5 additional counts, of which one included larceny. The second indictment, which was not present at the first trial, but at the second, was assault with intent to murder. This is what Judge Pugh is referring to: that the assault with intent to murder was not present at the first trial, but he was tried on that the second time.

Q But the only intervening event, which actually

took place relevant to the new sentencing, was his prison record and the fact that, when he came up for sentencing the second time, he denied what he had admitted at the sentencing the first time?

A Yes, plus the fact that the crime is more vividly described in the second trial rather than the first.

Q Well, I know, but that relates to events that happened before the first trial.

A Yes, sir. I would like to make it quite clear that it is not on the record -- this case was tried 3 years prior to Pearce -- and it is not said on the record these reasons, you understand that. I don't want to mislead anybody; it is not. But this is identifiable conduct, if we are looking for it from that point of view.

Q But you are arguing that Pearce didn't apply to this case at all.

A Yes, sir. That is correct.

Q Well, aren't you arguing that, if it does, the affidavit of Judge Pugh furnishes substantial reasons for a different sentence? At least that is the way I understood your brief.

A Yes, I would argue that, Your Honor, plus the fact that the distinguishing factor between this case and Pearce is that, in Pearce and Simpson both, the Court came to the conclusion that one Judge Johnson in the lower court,

the district court, found Mr. Rice, I believe it was, vindictively sentenced, that he was penalized for taking an appeal.

Q But isn't there the further factor here that you do have an intervening event? That you do have an intervening event in the form of the abandonment by the State of Maryland of one of its charges in the first trial, which was not abandoned in the second trial, but became the basis of another count. Is that not correct?

A You could term it an intervening event, but I don't think that could be construed why the sentence was increased, yes. In that case, yes.

Q That is all we are talking about in this case is why the sentence was increased, isn't it?

A Well, that is how we view it, Your Honor.

Q I wonder if I understand this clearly. Are we talking about anything more than the increased sentence on the conviction for armed robbery?

A I think, Your Honor, on the retroactive problem, we have to be talking of more.

Q I know, but are we concerned here -- As I understand it, he was tried the first time and convicted of armed robbery. He was also convicted of larceny, but the state abandoned that conviction for ---

A Excuse me. The state abandoned the larceny

count before it went to the jury.

Q So you have the 12 year sentence for armed robbery. And then when you get the new trial, he was convicted for assault with intent to murder?

A Yes, sir. That was the new indictment.

Q And convicted for armed robbery?

A That is correct.

Q And convicted for larceny? All three?

A Yes, sir.

Q But are we concerned with anything here except the increased sentence on the armed robbery conviction? That is what I am trying to get at.

A That is all you are concerned with, because that is the only one that was appealed.

Q Now, why is it you are suggesting Pearce is not applicable?

A I think the new procedure ruled in Pearce was predicated on the vindictiveness of a second court to sentence someone for taking an appeal. In this case, at no time, has the defendant Moon maintained that his sentence was increased because the judge vindictively increased his sentence.

Q This is not an argument that Pearce is inapplicable, because it ought to be prospective only. This is an argument that Pearce is inapplicable, because there is

no element here of vindictiveness on the imposition of the second armed robbery sentence.

A Yes, that would be one of our arguments. Of course, we also argue on the retroactivity of Pearce.

Q You also say that Pearce should not be retroactive at all?

A Your Honor, I understand that, as far as credit for time served, there is a footnote to the effect that it is retroactive. But we do not have this problem. This man not only got 217 extra days, because his sentence was sent back. And he got good time for that, and there is a footnote that he has to get good time. The correctional system of Maryland also gave him 86 days good time for the abortive time he spent ---

Q But I don't understand why you are telling us about the assault with intent to murder conviction at the second trial and with the larceny conviction at the second trial. What relevance have they to the issue that we have got to decide?

A I just was giving you the whole picture, Your Honor.

The distinguishing feature, as I have indicated in the case at bar, is that, as to Pearce and Simpson, is that in Pearce and Simpson the Court found that the second trial sentence was vindictively given. The man was then penalized for taking an appeal. Here, as I have indicated, 1) the defendant Moon

has never alleged that. In the three year journey to this Court he has never alleged that.

In addition, the Court of Appeals of Maryland went into this, and the Court of Appeals of Maryland found this a fact -- and this is recorded, of course, in their decision -- that there was no indication that the trial judge increased Moon's sentence because he had elected to have a new trial or for any other unworthy or improper motive.

Moving on to the question of retroactivity: The only thing that possibly the retroactivity of Pearce, as to this particular case, would be the procedural rule, which was enunciated by the Court. That whenever a judge imposes a more severe sentence upon a defendant after his new trial, the reasons must affirmatively appear.

Q You will agree, as I understand it, General Borgerding, with the basic holding and with the full retroactivity of the basic holding in Pearce: that it would be unconstitutional for a sentencing judge, after a second trial, to impose a higher sentence out of motivations of vindictiveness?

A Absolutely.

Q That is the basic constitutional holding of Pearce?

A Yes.

Q As I understand it, you concede that has always

been the rule of due process. To that extent, it is fully retroactive. Do I misunderstand you?

A I would say yes; it should have been always the rule. Because if somebody did vindictively increase a sentence, certainly, it can't be due process. And I have indicated that Maryland has followed a similar rule.

Q Long before this Court announced it. So there is no question about the full retroactivity, if that is the proper word for that basic holding under the due process clause of the Fourteenth Amendment? You are in agreement on that as I understand it.

A As far as the vindictiveness is concerned.

Q And that was the holding of Pearce.

A Yes, but not as far as the rules.

Q And Pearce went on to say that, in order to insure ---

A ell now, I don't think that the rule -- of course, if someone is vindictive in giving the sentence, that would violate the constitutional principle. But I think that we have a similar situation here as to the McCarthy rule. That the rule is to prevent the violation of a constitutional principle. And the rule in Pearce, as I view it, is to prevent a violation of giving an increased sentence for vindictiveness.

Now I would maintain that the rule, itself, should not be retroactive and citing the -- I know my time is running

out -- but citing the three purposes that this Court has used to measure retroactivity, certainly there is no question as to the purpose. The purpose would not be served by making it retroactive, because it is to insure that every defendant who was given a harsher sentence on retrial is not given that sentence out of vindictiveness or to alleviate the fear of vindictiveness and its chilling effect by spreading it on the record, so that the appellate judge or reviewing court can see that.

You cannot say -- and I hope that our statistics would indicate -- that all persons who received additional time did not receive it out of vindictiveness. But the evil sought to be remedied here by the new procedural rules does not per se exist in every case. Plus the fact that the defendant does have a remedy still under collateral proceedings, post-conviction and/or habeus corpus, although admitted difficult to prove.

I agree with Mr. Justice Stewart that the question of reliance upon the fact that a court did not have to set forth the reasons would be based in Stroud vs. United States and also in our own state on Hobbes vs. Maryland and the Mitchell Case.

We do present some problems as to the effect on the administration of justice: exactly how that this rule is applied retroactively. How is the procedure going to be set

up? Is the new judge going to give a sentence based on the record or the transcript? Does he just assume the old sentence, which this Court has held has been nullified? It presents a great many problems that must be faced. And it could thus be left unanswered by making the rule itself prospectively rather than -- and prospectively to June 23, 1969, the date of the Pearce decision.

Q May I ask you just one other question? I am sure it could have been spelled out of this record. Was the affidavit of the judge in the second trial, Judge Pugh, available in the files when petition for the writ was filed here or when it was granted?

A It was after it was granted, sir.

Q I notice that it is dated in October 1969, and the writ was granted in 1968, is that right?

A I think it was granted the day that you decided Benton, Benton vs. Maryland and Pearce vs. North Carolina.

Q But at that time it was perfectly clear that the explanation of Judge Pugh was not before the Court in granting certiorari.

A No, sir. And I had requested that because of what I considered the directive ---

Q You did this to meet the problem of June 23, 1969?

A Yes. After I had read the Pearce Case, I

thought it would be best that the Court had that information.

Q Are you arguing basically that, by reason of this affidavit, there was substantial compliance with the rule of the Pearce Case? And, secondly, if you are mistaken about that, then the rule should not be retroactive?

A I don't mean to imply that I think that that affidavit should serve as a substitute for the rule in the Pearce Case, only to the facts and reasons why the court sentenced this man to this particular sentence.

Q So your submission shows that the reason he sentenced him to a higher sentence was not, in any part, based upon vindictiveness, and that is where there is substantial compliance with the rule of the Pearce Case. Did I misunderstand you?

A No, sir.

Q Now I take it, I suppose it would be arguable at least, that Judge Pugh, having in mind the 1896 rule in Maryland -- going back to 1896 -- had all these things in mind, substantially, at the time he sentenced in the second trial?

A The easy answer would be to say yes, but I ---

Q I said it could be arguable.

A Yes, sir, it could be arguable, absolutely.

Q That is that if, since 1896, this has been the rule in Maryland -- I think that someone has told us several

times today that it is presumed that judges do what they are supposed to do.

A Yes, I would argue that.

Q I think your friend argued that.

A Thank you.

MR. CHIEF JUSTICE BURGER: You have about ten minutes, Counsel.

REBUTTAL ARGUMENT OF ROBERT ANTHONY JACQUES

ON BEHALF OF PETITIONER

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

With all due deference to my brother at the bar, I frankly find his argument almost totally irrelevant to the issues before the Court today. First of all, to go immediately to the issue of vindictiveness -- very frankly, I do not understand that the Pearce Case is limited to where the second judge is being vindictive. I took it to mean that this was a means of taking off any chilling effect on the right of appeal.

I have never contended that Judge Pugh was vindictive. I know Judge Pugh personally; I was a law clerk in that courthouse. The state has been consistently setting up -- and with all due respect to St. Thomas Acquinas -- the straw man: that the vindictiveness of the second trial judge is the issue before the Court. It has nothing to do with this appeal.

I am saying to the Court that if Judge Pugh had the

highest motives in the world, the ultimate fact of the matter is that Dennis Moon was sentenced to an additional 8 years imprisonment.

Q Then you don't read Pearce the way ---

A Absolutely not, Your Honor. I do not read it to be restricted to vindictive second-sentencing judges.

Q The trouble is, if I may say so, you would like to make the majority opinion in Pearce the position that Justice Douglas and I took, that it was -- given Benton -- a double jeopardy problem.

A That is correct, Your Honor.

Q But we didn't prevail on that.

A But, Your Honor, I think, reading the plurality opinion in Pearce, which was based on due process ---

Q That was the Court opinion.

A --- which was based, as I recall, on due process, I don't recall that the Court stated that it was restricted to where there was factual evidence that the second trial judge had been vindictive and malicious in his sentence.

I think that the state is trying, very cleverly, to restrict this argument to that issue, which is, I submit, totally irrelevant to these proceedings. The only issue here is whether Dennis Moon received additional time in jail. He obviously ---

Q Well, he did; that is not an issue; that is a

fact. He did.

A He did. Then the issue, Your Honor, is that punishment. Is that increased punishment within the meaning of Pearce? I submit to you that it is an increased punishment, and I submit that vindictiveness, malice are totally irrelevant. It is simply a differing judicial philosophy between two judges. That is all that this case is based upon.

And I submit, to quote President Truman, that the other charges are red herrings to be brought up here. They have nothing to do with the armed robbery charge. That is the only charge upon which the appeal was based.

I believe there was a question as to why the other charges were not appealed. Very candidly, Your Honor, I think I am a rather pragmatic lawyer. Where a man is given concurrent or suspended sentences, I am not about to appeal. And without the authority of North Carolina vs. Pearce, I wouldn't dared to have entered an appeal in this case, so I chose not to.

Q Mr. Jacques.

A Yes, Your Honor.

Q I would assume that you have had experience where one judge is noted for giving out stiff sentences ---

A Absolutely.

Q --- and another one is not.

A That is correct.

Q And if you go before a stiff man, aren't you

losing some of your rights or something?

A Is Your Honor talking ---

Q You don't have a right to go before a lenient judge.

A Oh no. I am not saying that, Your Honor. I have never raised that.

Q Or you don't have a right not to go before a heavy-handed judge.

A No, I am not saying that either.

Q Well, if this man had gone before a judge that had heard the same testimony and had cut his sentence, that would have been fine?

A Obviously. I mean certainly. But if Your Honor is asking me that, if the first judge had given Moon 20 years, whether that would have been improper, I will tell this Court quite frankly -- if we are getting into an area of judgment -- there was nothing improper about giving Moon 20 years. In all candor -- well, perhaps I shouldn't say it -- let's just say that I have never argued that the sentence, itself, is harsh.

That is, I submit, totally irrelevant. The first judge passed a valid sentence. The second judge passed a valid sentence.

Now the fact of his increased knowledge and all of this is, again, completely outside of the record of this case.

Certainly this Court knows better than I what it meant when it talks about conduct subsequent to the first trial. With all due respect to my brother, there is no conduct subsequent to the first trial in this case, except a second trial. Certainly I would hope that the state is not going to argue that because he plead guilty at the first trial and didn't plead guilty at the second trial, that that is conduct for which the second trial judge can take judicial notice.

Q Now wait a minute, Counsel, you have lost me. He didn't plead guilty at the first trial.

A No. The question was raised, if it would please the Court, that he admitted his guilt at the end of his first trial but denied his guilt at his second trial.

Q But he did more than that. His testimony under oath was very different in the first trial and the second trial. It wasn't in the sentencing process alone.

A As I recall, Your Honor ---

Q I have just read the record out of the appendix.

A At the first trial he said he did it. At the second trial he denied he did it.

Q Well, that is quite a difference, isn't it?

A That is quite a difference, but, with all due respect, I don't think the Court can say that that is conduct subsequent to his first conviction which would justify an increased sentence. That is part of his trial.

Q Some judges would think so.

A I interpret it very strictly, Your Honor, that conduct means events, which the Court has talked about, perhaps his being a disorderly prisoner, perhaps creating further crimes.

Q You mean like lying.

A No, Your Honor, I don't think that is conduct. Conduct to me means further trouble, very candidly. And if there is going to be futher trouble, I think that should be the subject for further proceedings.

I think conduct means -- as this Court, as I think, meant in the 3 opinions in Pearce -- and I know Mr. Justice White that you interpreted conduct to mean any events which the second trial judge knew which the first trial judge did not -- but I think ---

Q I didn't prevail on that.

A That is correct. But I think Your Honor was acknowledging that the majority in the Court opinion restricted conduct to the facts that occurred after the first conviction.

Q But that doesn't carry you so far as you attempted to go a momemt ago. That is to say that your committing perjury in your second trial is not an event.

A Well, please the Court, I would have very strong doubts about holding that to be perjury ---

Q I know you do, but that is the issue in the case.

A But the court would have to hold that that was perjury, which it seems to me, under Maryland law, that would have to be a separate trial on that question of perjury. Perjury is a felony under Maryland law.

Please the Court, I don't think the second trial judge could look at the record of the first trial and say, "You lied Moon. You admitted at the first trial that you did it, and you are not admitting it today. I therefore hold that you are guilty of perjury and, under the authority of North Carolina vs. Pearce, I sentence you to another 8 years in jail."

Frankly, Your Honor that is just ---

Q Was the second testimony under oath?

A Your Honor, I don't think so.

Q Usually it is not.

A Now, I was not the trial counsel, but he stood up, and Judge Pugh said, "Do you have anything to say?" And he said, "I didn't do it." And I am very frankly most reluctant to ever prosecute a case of perjury based on those circumstances.

I might say, Your Honor, also that the court supplying an affidavit, some three and one-half years later, conceded that Pearce did not exist is -- if I may be facetious -- bad retroactivity as opposed to the good retroactivity I am trying to urge in holding Pearce to be fully retroactive.

It is, in effect, a nunc pro tunc rationalization of

the sentence. Now if Judge Pugh had stated reasons at the closing argument -- Judge Pugh felt that this man had committed a bad crime and deserved 20 years. That is the long and short of it. And, very frankly, I am not arguing with Judge Pugh that he didn't deserve every day of those 20 years. That is not the issue before the Court today.

I think that the rest of it, about other charges, about there being malice is totally irrelevant to the issue before the Court. I am sorry, I believe my time is up.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jacques. Thank you, General for your submission. The case is submitted.

(Whereupon at 2:55 p.m. the argument in the above-entitled matter was concluded.)