

The Burger Court Opinion Writing Database

Loper v. Beto

405 U.S. 473 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 26, 1972

Re: No. 70-5388 - Loper v. Beto

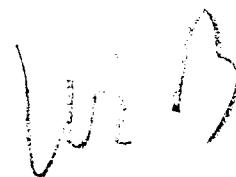
MEMORANDUM TO THE CONFERENCE:

We seem to have some confusion on the assignment of the above case. On receiving Potter and Bill Brennan's notes I checked my sheets and found that there were some indications that a "DIG" might be possible in light of the present state of the sentence and the parole now in effect.

There was indeed a majority to reverse but for varying scope. This can be clarified when we gather on Lewis' matter if not before.

Since I voted to reverse or "DIG" I will make the assignment for whichever of those two finally commands a majority.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

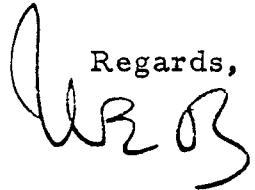
January 31, 1972

No. 70-5388 -- Loper v. Beto

Dear Bill:

This will confirm that the assignment of this case is to be resolved by you since you have now withdrawn your "pass" and voted to reverse for a new trial.

Regards,



Mr. Justice Douglas

Copies to the Conference



Re Storer v. Becto
70-5388

Supreme Court of the United States
Washington, D. C. 20543 April 16, 1972

CHAMBERS OF
THE CHIEF JUSTICE

Dear Brie

I will join
your dissent but
meanwhile I had
started some
dissenting thoughts
which I may or
may not use.
This is really a case
the Court's "swimming" a
good thing into the ground
It is sheer nonsense. Before
USSB

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Church of Jesus

Circulated: MAR 2 19

Recirculated:

No. 71-5388 -- Loper v. Beto

MR. CHIEF JUSTICE BURGER, dissenting.

In 1942 this Court, in deciding Betts v. Brady, 316 U.S. 455, held that the Due Process Clause of the Fourteenth Amendment did not call for the setting aside of a robbery conviction which had been entered against an indigent defendant whose request for appointed counsel had been denied by the state trial court. Betts was overruled in 1963 by Gideon v. Wainwright, 372 U.S. 335. Loper's trial for rape was held five years after Betts and 16 years before Gideon, and the oldest of the impeaching convictions is 41 years old. Yet the Court today holds that an error of constitutional magnitude occurred when the judge presiding at Loper's trial failed to make, on his own motion, an evidentiary ruling that would have been inconsistent both with state law and with the United States Constitution as then explicitly interpreted by this Court. I dissent.

3

12
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 3, 1972

Re: No. 70-5388 - Loper v. Beto

Dear Bill:

Please join me in your dissent.

Regards,

W.B.

Mr. Justice Rehnquist

cc: The Conference

6
Part (2) rewritten

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Black
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: The Clerk Justice

No. 70-5388

Circulated:

Recirculated: **MAR 7 1972**

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[March —, 1972]

MR. CHIEF JUSTICE BURGER, dissenting.

In 1942 this Court, in deciding *Betts v. Brady*, 316 U. S. 455, held that the Due Process Clause of the Fourteenth Amendment did not call for the setting aside of a robbery conviction which had been entered against an indigent defendant whose request for appointed counsel had been denied by the state trial court. *Betts* was overruled in 1963 by *Gideon v. Wainwright*, 372 U. S. 335. Loper's trial for rape was held five years after *Betts* and 16 years before *Gideon*, and the oldest of Loper's impeaching convictions is 41 years old. Yet the Court today holds that an error of constitutional magnitude occurred when the judge presiding at Loper's trial failed to make, on his own motion, an *evidentiary ruling* that would have been inconsistent both with state law and with the United States Constitution as then explicitly interpreted by this Court and every state supreme court. I dissent.

(1)

Three witnesses were called at Loper's 1947 trial. His eight-year-old stepdaughter testified that Loper raped her on August 9, 1947. A physician gave testimony corroborating that the child had been raped. Loper himself denied having committed the act, but admitted that

pp. 6, 7, 8
+ minor editorial changes

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5388

Received MAR 10 1972

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[March —, 1972]

MR. CHIEF JUSTICE BURGER, dissenting.

In 1942 this Court, in deciding *Betts v. Brady*, 316 U. S. 455, held that the Due Process Clause of the Fourteenth Amendment did not call for the setting aside of a robbery conviction which had been entered against an indigent defendant whose request for appointed counsel had been denied by the state trial court. *Betts* was overruled in 1963 by *Gideon v. Wainwright*, 372 U. S. 335. Loper's trial for rape was held five years after *Betts* and 16 years before *Gideon*. Yet the Court today holds that an error of constitutional magnitude occurred when the judge presiding at Loper's trial failed to make, on his own motion, an *evidentiary ruling* that would have been inconsistent both with state law and with the United States Constitution as then explicitly interpreted by this Court and every state supreme court. I dissent.

(1)

Three witnesses were called at Loper's 1947 trial. His eight-year-old stepdaughter testified that Loper raped her on August 9, 1947. A physician gave testimony corroborating that the child had been raped. Loper himself denied having committed the act, but admitted that there was a period of time during the day in question when he was at home alone with his stepdaughter and his four-month-old baby boy; he further admitted on



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

70-5388

31
p 9 - fn. 3 written
2
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES: The Court in Conference

No. 70-5388

Circulated: _____

Recirculated: Mar. 21, 1972

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

[March 22, 1972]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, dissenting.

In 1942 this Court, in deciding *Betts v. Brady*, 316 U. S. 455, held that the Due Process Clause of the Fourteenth Amendment did not call for the setting aside of a robbery conviction which had been entered against an indigent defendant whose request for appointed counsel had been denied by the state trial court. *Betts* was overruled in 1963 by *Gideon v. Wainwright*, 372 U. S. 335. Loper's trial for rape was held five years after *Betts* and 16 years before *Gideon*. Yet the Court today holds that an error of constitutional magnitude occurred when the judge presiding at Loper's trial failed to make, on his own motion, an *evidentiary ruling* that would have been inconsistent both with state law and with the United States Constitution as then explicitly interpreted by this Court. I dissent.

(1)

Three witnesses were called at Loper's 1947 trial. His eight-year-old stepdaughter testified that Loper raped her on August 9, 1947. A physician gave testimony corroborating that the child had been raped. Loper himself denied having committed the act, but admitted that there was a period of time during the day in question when he was at home alone with his stepdaughter and his four-month-old baby boy; he further admitted on

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 27, 1972

Dear Chief:

I missed argument in No. 70-5388 -
Loper v. Beto, and hence did not vote when
the case was discussed at Conference.

I have now done my homework in the
case and vote to reverse. My reason is
that the evidence of prior convictions
obtained when the accused had no counsel
was used "to support guilt" in violation
of Burgett v. Texas, 389 U.S. 109. There
must, therefore, be a new trial, not
merely a resentencing.

cc: (D)
William O. Douglas

The Chief Justice

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 31, 1972

Dear Chief:

In re No. 70-5388 - Loper v. Beto

I have your note of January 31st.

The earlier assignment of this case to Potter Stewart was, I think, the proper one, and it should stand.

W. O. D.

The Chief Justice

cc: Conference

b
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 2, 1972

Dear Potter:

In No. 70-5388 - Loper v.

Beto, please join me in your opinion.

William O. Douglas

Mr. Justice Stewart

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 26, 1972

RE: No. 70-5388 - Loper v. Beto

Dear Chief:

My notes show that there were five votes to reverse in this case - Harry Blackmun, Thurgood Marshall, Byron White, Potter Stewart and I; two votes to remand for resentence - Lewis Powell and yourself; one vote to affirm - Bill Rehnquist and Bill Douglas passed.

I had supposed in that circumstance it would fall to me to assign the opinion. The assignment sheet, however, shows that you have assigned it to yourself to write an opinion dismissing as improvidently granted. No one seems to have cast that vote. Since the assignment does fall to me, I'll assign it to Potter.

26-1-8
Sincerely,

WJ

The Chief Justice

cc: The Conference

8
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 3, 1972

RE: No. 70-5388 - Loper v. Beto

Dear Potter:

I agree.

Sincerely,



Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 26, 1972

70-5388 - Loper v. Beto

Dear Chief,

My notes do not show that anyone at the Conference voted to dismiss this case as improvidently granted. In due course I shall circulate a memorandum expressing my views on the merits.

Sincerely yours,

PS
1/26/72

The Chief Justice

Copies to the Conference

Placed in mail
G 2/2/72

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: FEB 2 1972

No. 70-5388

Recirculated: _____

Otis Loper, Petitioner,

v.

George J. Beto, Director,
Texas Department of
Corrections.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old step-daughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931-1940, three in Mississippi and one in Tennessee.¹

¹ "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?

"A. About twice in the past ten years.

"Q. How about on May 7th, 1940, weren't you arrested . . .

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case.

"THE COURT: Well, let him finish the question, Mr. Letts.

[Footnote 1 continued on p. 2]

pp 6-7
J. Stewart
2/20
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 70-5388

Recirculated: FEB 7 1972

Otis Loper, Petitioner, |
v. | On Writ of Certiorari to the
George J. Beto, Director, | United States Court of Ap-
Texas Department of | peals for the Fifth Circuit.
Corrections.

[February —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old step-daughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931-1940, three in Mississippi and one in Tennessee.¹

¹ "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?

"A. About twice in the past ten years.

"Q. How about on May 7th, 1940, weren't you arrested . . .

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case.

"THE COURT: Well, let him finish the question, Mr. Letts.

[Footnote 1 continued on p. 2]

CD
PP 6-7
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____
Recirculated: FEB 15 197

No. 70-5388

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[February ___, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old step-daughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931-1940, three in Mississippi and one in Tennessee.¹

¹ "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?"

"A. About twice in the past ten years."

"Q. How about on May 7th, 1940, weren't you arrested . . ."

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case."

"THE COURT: Well, let him finish the question, Mr. Letts.

[Footnote 1 continued on p. 2]

✓
p. 7
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Supreme, U.

4th DRAFT

Recirculated: _____
Recirculated: Feb 15 1972

SUPREME COURT OF THE UNITED STATES

No. 70-5388

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old step-daughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931-1940, three in Mississippi and one in Tennessee.¹

¹ "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?"

"A. About twice in the past ten years."

"Q. How about on May 7th, 1940, weren't you arrested . . ."

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case."

"THE COURT: Well, let him finish the question, Mr. Letts."

[Footnote 1 continued on p. 2]

88 1110
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 70-5388

Recirculated: FEB 23 1972

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old step-daughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931-1940, three in Mississippi and one in Tennessee.¹

¹ "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?"

"A. About twice in the past ten years."

"Q. How about on May 7th, 1940, weren't you arrested . . ."

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case."

"THE COURT: Well, let him finish the question, Mr. Letts."

[Footnote 1 continued on p. 2]

B My BS 10-11

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES¹

States: _____

Recirculated: MAR 13 1977.

No. 70-5388

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. | On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[March —, 1972]

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old step-daughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931-1940, three in Mississippi and one in Tennessee.¹

¹ "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?

"A. About twice in the past ten years.

"Q. How about on May 7th, 1940, weren't you arrested . . .

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case.

"THE COURT: Well, let him finish the question, Mr. Letts.

[Footnote 1 continued on p. 2]

B
AM
C.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

7th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

dated: _____
Recirculated: MAR 16 1972

No. 70-5388

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

[March —, 1972]

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old step-daughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931-1940, three in Mississippi and one in Tennessee.¹

¹ "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?"

"A. About twice in the past ten years."

"Q. How about on May 7th, 1940, weren't you arrested . . .

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case."

"THE COURT: Well, let him finish the question, Mr. Letts.

[Footnote 1 continued on p. 2]

5
You printed it
JW

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
 Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

circulated: 2-16-72

Recirculated: _____

No. 70-5388

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE WHITE, concurring in the result.

The Court of Appeals affirmed the denial of Loper's petition for habeas corpus, reasoning that the use of invalid prior convictions to impeach a defendant in a criminal case does not raise an issue of constitutional proportions even though so using those convictions might well have influenced the outcome of the case. It was on that issue that we granted certiorari; and as our past cases now stand, I agree with MR. JUSTICE STEWART that the Court of Appeals' reasons for affirming the District Court were erroneous. This judgment, however, does not necessarily mean that Loper's conviction must be set aside. There remain issues, unresolved by the Court of Appeals, as to whether the challenged prior convictions were legally infirm: was Loper represented by counsel at the time of the earlier convictions; if not, did he waive counsel? These matters are best addressed in the first instance by the Court of Appeals. The same is true with respect to the legal significance of the lack of proof with respect to the validity of one or more of the prior convictions used for impeachment purposes at Loper's trial. In this connection, I do not understand our prior decisions to hold that there is no room in cases such as this for a finding of harmless error; and if this case is ultimately to turn on whether there was harmless error or not, I would prefer to have the initial judgment of the lower court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 3, 1972

Re: No. 70-5388 - Loper v. Beto

Dear Potter:

Please join me.

Sincerely,



T.M.

Mr. Justice Stewart

cc: The Conference

67 ✓

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 2/13/72

No. 70-3388

Recirculated: _____

Otis Loper, Petitioner,
v. On Writ of Certiorari to the
George J. Beto, Director, United States Court of Ap-
Texas Department of peals for the Fifth Circuit.
Corrections.

[February —, 1972]

MR. JUSTICE BLACKMUN, dissenting.

The Court in this case applies *Burgett v. Texas*, 389 U. S. 109 (1967), and, seemingly, *United States v. Tucker*, — U. S. — (1972), to proscribe the use of allegedly uncounseled prior convictions of many years ago for the purpose of impeaching the defendant who takes the stand in his own defense. *Burgett* may be claimed to be a natural succeeding step to *Gideon v. Wainwright*, 372 U. S. 335 (1963), but its application to Loper's case has aspects, not particularly stressed by the Court, that are troublesome for me:

1. The resolution of the original statutory rape case came down to a choice, on the part of the jury, between the testimony of the eight-year-old victim and the testimony of Loper. This, of course, is not uncommon in a rape case, but it always provides an element of unreliability. It is the woman's—or the child's—word against the man's. Hanging in the balance is a penalty of great severity. The 50-year sentence imposed on Loper is illustrative and is a tempting target for a reviewing court.

2. Obviously, the Court's familiar remand "for further proceedings consistent with this opinion" is really meaningless in this case. Certainly it does not carry with it the usual meaning and implications. The incident that is the subject of the criminal charge took place 25 years

9
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 15, 1972

Re: No. 70-5388 - Loper v. Beto

Dear Bill:

Please join me in your dissent.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

C
My
pp. 13

2nd DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated:

No. 70-5388

Recirculated: 3/3/72

SUPREME COURT OF THE UNITED STATES

Otis Loper, Petitioner.
v.
George J. Beto, Director,
Texas Department of
Corrections.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Fifth Circuit.

[March 6, 1972]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUS- |
TICE joins, dissenting.

The Court in this case applies *Burgett v. Texas*, 389 U. S. 109 (1967), and, seemingly, *United States v. Tucker*, — U. S. — (1972), to proscribe the use of allegedly uncounseled prior convictions of many years ago for the purpose of impeaching the defendant who takes the stand in his own defense. *Burgett* may be claimed to be a natural succeeding step to *Gideon v. Wainwright*, 372 U. S. 335 (1963), but its application to Loper's case has aspects, not particularly stressed by the Court, that are troublesome for me:

1. The resolution of the original statutory rape case came down to a choice, on the part of the jury, between the testimony of the eight-year-old victim and the testimony of Loper. This, of course, is not uncommon in a rape case, but it always provides an element of unsureness. It is the woman's—or the child's—word against the man's. Hanging in the balance is a penalty of great severity. The 50-year sentence imposed on Loper is illustrative and is a tempting target for a reviewing court.

2. Obviously, the Court's familiar remand "for further proceedings consistent with this opinion" is really meaningless in this case. Certainly it does not carry with it the usual meaning and implications. The incident that

B
R.

To: The Chief Justice
Mr. Justice Douglas ✓
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From Blackmun, J.

No. 70-5388

Circulated:

Recirculated: 3/6/72

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Fifth Circuit.

[March —, 1972]

MR. JUSTICE BLACKMUN, dissenting.

The Court in this case applies *Burgett v. Texas*, 389 U. S. 109 (1967), and, seemingly, *United States v. Tucker*, — U. S. — (1972), to proscribe the use of allegedly uncounseled prior convictions of many years ago for the purpose of impeaching the defendant who takes the stand in his own defense. *Burgett* may be claimed to be a natural succeeding step to *Gideon v. Wainwright*, 372 U. S. 335 (1963), but its application to Loper's case has aspects, not particularly stressed by the Court, that are troublesome for me:

1. The resolution of the original statutory rape case came down to a choice, on the part of the jury, between the testimony of the eight-year-old victim and the testimony of Loper. This, of course, is not uncommon in a rape case, but it always provides an element of unreliability. It is the woman's—or the child's—word against the man's. Hanging in the balance is a penalty of great severity. The 50-year sentence imposed on Loper is illustrative and is a tempting target for a reviewing court.

2. Obviously, the Court's familiar remand "for further proceedings consistent with this opinion" is really meaningless in this case. Certainly it does not carry with it the usual meaning and implications. The incident that

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 11, 1972

Re: No. 70-5388 Loper v. Beto

Dear Bill:

Please join me in your dissent.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

B. N. H.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 10, 1972

Re: No. 70-5388 Loper v. Beto

Dear Chief:

Please join me in your dissent.

Sincerely,

L. F. P.

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 11, 1972

Re: No. 70-5388 Loper v. Beto

Dear Bill:

Please join me in your dissent.

Sincerely,

L. F. P.

Mr. Justice Rehnquist

cc: The Conference

*Bill - I signed with my name
Thank you and very sincerely yours*

L. C.

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE

NOTICE: THIS MATERIAL MAY
BE PROTECTED BY COPYRIGHT
LAW (TITLE 17, U.S. CODE)

This document may not be further reproduced
or distributed without the specific authori-
zation of the Hoover Institution Archives.

THIS DOCUMENT MAY NOT BE FURTHER REPRODUCED
OR DISTRIBUTED WITHOUT THE SPECIFIC AUTHORITY
OF THE HOOVER INSTITUTION ARCHIVES.

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE

NOTICE: THIS MATERIAL MAY
BE PROTECTED BY COPYRIGHT
LAW (TITLE 17, U.S. CODE)

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5388

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

In reversing the judgment of the Court of Appeals which affirmed denial of federal habeas relief to petitioner, the Court undertakes to extend the constitutional doctrine of *Burgett v. Texas*, 389 U. S. 109 (1967), and *United States v. Tucker*, — U. S. — (1972), to the case where the uncounseled conviction is used to impeach the criminal defendant when he takes the stand in his own defense at subsequent trial. In order to reach this question, of course, the Court must conclude that the prior burglary convictions obtained during the 1930's in Tennessee and Mississippi were in fact uncounseled, and that the defendant had not waived the constitutional right to counsel which *Gideon v. Wainwright*, 372 U. S. 335 (1963), accords him. Petitioner so testified at the federal habeas hearing. But the habeas judge, a veteran of more than 20 years' experience as a federal district court judge, found as follows with respect to petitioner's assertions of constitutional error:

"At the outset it might be stated that petitioner made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be put in his own testimony . . ." (App., p. 61.)

To: The Chief Justice
Mr. Justice ~~John~~ ~~John~~
Mr. Justice ~~John~~ ~~John~~
Mr. Justice ~~John~~ ~~John~~
Mr. Justice ~~John~~ ~~John~~
Mr. Justice John
Mr. Justice ~~John~~ ~~John~~
Mr. Justice ~~John~~ ~~John~~

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5388

Received: 27-7-12

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

In reversing the judgment of the Court of Appeals which affirmed denial of federal habeas relief to petitioner, the Court undertakes to extend the constitutional doctrine of *Burgett v. Texas*, 389 U. S. 109 (1967), and *United States v. Tucker*, — U. S. — (1972), to the case where the uncounseled conviction is used to impeach the criminal defendant when he takes the stand in his own defense at subsequent trial. In order to reach this question, of course, the Court must conclude that the prior burglary convictions obtained during the 1930's in Tennessee and Mississippi were in fact uncounseled, and that the defendant had not waived the constitutional right to counsel which *Gideon v. Wainwright*, 372 U. S. 335 (1963), accords him. Petitioner so testified at the federal habeas hearing. But the habeas judge, a veteran of more than 20 years' experience as a federal district court judge, found as follows with respect to petitioner's assertions of constitutional error:

"At the outset it might be stated that petitioner made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be put in his own testimony" (App., p. 61.)

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

2nd DRAFT

From: Peabiquist,

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 70-5388

Dated: 2-8-12

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

In reversing the judgment of the Court of Appeals which affirmed denial of federal habeas relief to petitioner, the Court undertakes to apply the constitutional doctrine of *Burgett v. Texas*, 389 U. S. 109 (1967), and *United States v. Tucker*, — U. S. — (1972), to the case where the uncounseled conviction is used to impeach the criminal defendant when he takes the stand in his own defense at subsequent trial. In order to reach this question, of course, the Court must conclude that the prior burglary convictions obtained during the 1930's in Tennessee and Mississippi were in fact uncounseled, and that the defendant had not waived the constitutional right to counsel which *Gideon v. Wainwright*, 372 U. S. 335 (1963), accords him. Petitioner so testified at the federal habeas hearing. But the habeas judge, a veteran of more than 20 years' experience as a federal district court judge, found as follows with respect to petitioner's assertions of constitutional error:

"At the outset it might be stated that petitioner made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be put in his own testimony" (App., p. 61.)

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr.~~ Justice Marshall

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5388 - John Bohnquist, J.

Otis Loper, Petitioner, v. George J. Beto, Director, Texas Department of Corrections. On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

In reversing the judgment of the Court of Appeals which affirmed denial of federal habeas relief to petitioner, the Court undertakes to apply the constitutional doctrine of *Burgett v. Texas*, 389 U. S. 109 (1967), and *United States v. Tucker*, — U. S. — (1972), to the case where the uncounseled conviction is used to impeach the criminal defendant when he takes the stand in his own defense at subsequent trial. In order to reach this question, of course, the Court must conclude that the prior burglary convictions obtained during the 1930's in Tennessee and Mississippi were in fact uncounseled, and that the defendant had not waived the constitutional right to counsel which *Gideon v. Wainwright*, 372 U. S. 335 (1963), accords him. Petitioner so testified at the federal habeas hearing. But the habeas judge, a veteran of more than 20 years' experience as a federal district court judge, found as follows with respect to petitioner's assertions of constitutional error:

"At the outset it might be stated that petitioner made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be put in his own testimony" (App., p. 61.)

3
Wm. C. B. 1.6
B
Mr. Justice Douglas
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

SUPREME COURT OF THE UNITED STATES

No. 70-5388

From: Rehnquist, J.

Circulated:

Otis Loper, Petitioner,
v.
George J. Beto, Director,
Texas Department of
Corrections.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Fifth Circuit.
Recirculated: 3-22-77

[March 22, 1972]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

In reversing the judgment of the Court of Appeals which affirmed denial of federal habeas relief to petitioner, the Court undertakes to apply the constitutional doctrine of *Burgett v. Texas*, 389 U. S. 109 (1967), and *United States v. Tucker*, — U. S. — (1972), to the case where the uncounseled conviction is used to impeach the criminal defendant when he takes the stand in his own defense at subsequent trial. In order to reach this question, of course, the Court must conclude that the prior burglary convictions obtained during the 1930's in Tennessee and Mississippi were in fact uncounseled, and that the defendant had not waived the constitutional right to counsel which *Gideon v. Wainwright*, 372 U. S. 335 (1963), accords him. Petitioner so testified with respect to the Mississippi convictions at the federal habeas hearing. But the habeas judge, a veteran of more than 20 years' experience as a federal district court judge, found as follows with respect to petitioner's assertions of constitutional error:

"At the outset it might be stated that petitioner made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be put in his own testimony . . ."
(App., p. 61.)