

# The Burger Court Opinion Writing Database

*United States v. Grayson*

438 U.S. 41 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



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

From: The Chief Justice

Circulated: MAY 19 1978

Recirculated: 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1572

United States, Petitioner, } On Writ of Certiorari to the United  
v. } States Court of Appeals for the  
Ted R. Grayson. } Third Circuit.

[May —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a holding of the Court of Appeals that it was improper for a sentencing judge, in fixing the sentence within the statutory limits, to give consideration to the defendant's false testimony observed by the judge during the trial.

I

In August 1975, respondent Grayson was confined in a federal prison camp under a conviction for distributing a controlled substance. In October, he escaped but was apprehended two days later by FBI agents in New York City. He was indicted for prison escape in violation of 18 U. S. C. § 751 (a).

During its case-in-chief, the United States proved the essential elements of the crime, including his lawful confinement and the unlawful escape. In addition, it presented the testimony of the arresting FBI agents that Grayson, upon being apprehended, denied his true identity.

Grayson testified in his own defense. He admitted leaving the camp but asserted that he did so out of fear: "I had just been threatened with a large stick with a nail protruding through it by an inmate that was serving time at Allenwood, and I was scared, and I just ran." He testified that the threat

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 23, 1978

Re: Case held for No. 76-1572, United States v. Grayson

MEMORANDUM FOR THE CONFERENCE

United States v. Moriani, No. 76-1871 (3d Cir.) --

I WILL VOTE TO GRANT, VACATE AND REMAND FOR  
REINSTATEMENT OF THE SENTENCE OF THE DISTRICT COURT.

Respondent and others were indicted on two armed bank robbery charges. Pursuant to a plea bargain, resp agreed to plead guilty to one charge and to cooperate with the Government in connection with the trials of his co-defendants. The Government agreed to dismiss the second charge and to inform the sentencing District Court of resp's cooperation.

Resp testified at a co-defendant's trial as a defense witness, stating that the co-defendant had not participated in the bank robbery. The co-defendant was convicted nevertheless.

Later resp appeared for sentencing before the same district judge who had accepted resp's guilty plea and who had presided at the co-defendant's trial. The judge asked resp whether any promises regarding his sentence had been made to him. Resp replied that "[t]he prosecutor said they would make a recommendation for a very light sentence and it would be served at Lewisburg . . . ." The judge then determined from the transcript of resp's plea proceeding that this unsworn statement was at variance with his sworn statements at that earlier proceeding. The judge imposed the maximum sentence, noting a variety of considerations leading to his sentencing decision, including his belief that resp gave perjured testimony at the co-defendant's trial and lied at sentencing regarding the plea agreement.

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

W  
CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

March 7, 1978

MEMORANDUM TO: Mr. Justice Stewart  
Mr. Justice Marshall

RE: No. 76-1572 United States v. Grayson

This will confirm that Potter will undertake  
the dissent in the above.

*WJB*  
W.J.B. Jr.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 19, 1978

RE: No. 76-1572 United States v. Grayson

Dear Potter:

Please join me.

Sincerely,

*Bill*

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 22, 1978

Re: No. 76-1572, U. S. v. Grayson

Dear Chief,

In due course, I shall be circulating a dissenting opinion in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

UNITED STATES v. GRAYSON, No. 76-1572

From: Mr. Justice Stewart

Circulated: 19 JUN 1978

MR. JUSTICE STEWART, dissenting.

Recirculated: \_\_\_\_\_

The Court begins its consideration of this case, ante at 1, with the assumption that the respondent gave false testimony at his trial. But there has been no determination that his testimony was false. This respondent was given a greater sentence than he would otherwise have received -- how much greater we have no way of knowing -- solely because a single judge thought that he had not testified truthfully.<sup>1/</sup> In essence, the Court holds today that whenever a defendant testifies in his own behalf and is found guilty, he opens himself to the possibility of an enhanced sentence. Such a sentence is nothing more nor less than a penalty imposed on the

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Powell  
Mr. Justice Brennan  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: \_\_\_\_\_  
23 JUN 1978

Recirculated: \_\_\_\_\_

p. 3

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1572

United States, Petitioner, } On Writ of Certiorari to the United  
v. } States Court of Appeals for the  
Ted R. Grayson. } Third Circuit.

[June —, 1978]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN  
and MR. JUSTICE MARSHALL join, dissenting.

The Court begins its consideration of this case, *ante*, at 1, with the assumption that the respondent gave false testimony at his trial. But there has been no determination that his testimony was false. This respondent was given a greater sentence than he would otherwise have received—how much greater we have no way of knowing—solely because a single judge *thought* that he had not testified truthfully.<sup>1</sup> In essence, the Court holds today that *whenever* a defendant testifies in his own behalf and is found guilty, he opens himself to the possibility of an enhanced sentence. Such a sentence is nothing more nor less than a penalty imposed on the de-

<sup>1</sup> We know this only because of the trial judge's laudable explication of his reasons for imposing the sentence in this case. In many cases it would be impossible to discern whether a sentencing judge had been influenced by his belief that the defendant had not testified truthfully, since there is no requirement that reasons be given. But that fact does not argue against correcting an erroneous sentencing policy that is apparent on the face of the record. Cf. *Bordenkircher v. Hayes*, — U. S. —, — (POWELL, J., dissenting). As the Court notes, *ante*, at 13, "the integrity of the judges" is a sufficient guarantee that they will not consciously consider factors that have been declared impermissible, even if the reasons for imposing a particular sentence are not stated on the record.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 22, 1978

Re: 76-1572 - United States v. Grayson

Dear Chief,

I join your opinion but hope you would agree to replace the three words "which we reject" in the 16th line on page 11 with the words "that is inconsistent with the underlying precepts of our criminal justice system."

Also, I think the material in footnote 11 warrants placement in the text. I, for one, would suppose the practice covered by this opinion would be employed only with some care.

Sincerely yours,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 22, 1978

Re: No. 76-1572 - United States v. Grayson

Dear Chief:

I shall await the dissent.

Sincerely,



T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 19, 1978

Re: No. 76-1572 - United States v. Grayson

Dear Potter:

Please join me.

Sincerely,

*T.M.*

T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 22, 1978

Re: No. 76-1572 - United States v. Grayson

Dear Chief:

Please join me.

Sincerely,

*H.A.B.*

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 24, 1978

No. 76-1572 United States v. Grayson

Dear Chief:

Please join me in your opinion.

I note that you have accepted Byron's suggestions, which also are agreeable to me. I do observe that you place a good deal of emphasis on the "potential for rehabilitation". My understanding is that the proposed new Federal Criminal Code accepts, to a large extent, the current "conventional wisdom" that earlier perceptions on this subject are questionable if not erroneous. The proposed Code therefore minimizes, and in some instances omits entirely (as I understand it), indeterminate sentences. It also severely constricts the opportunity for parole.

I myself, since coming to this Court and seeing how ineffective the prevailing doctrines have proved in practice, no longer attribute primary importance to the rehabilitation concept. In most adult felony cases, I suspect it is largely a mirage.

Would it be appropriate to include some general reference to the sentencing provision of the proposed Federal Criminal Code?

Sincerely,

*Lewis*

The Chief Justice

Copies to the Conference

LFP/ss

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 22, 1978

Re: No. 76-1572 - United States v. Grayson

Dear Chief:

Please join me.

Sincerely,

*WRW*

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 22, 1978

Re: 76-1572 - United States v. Grayson

Dear Chief:

Please join me.

Respectfully,



The Chief Justice  
Copies to the Conference