

Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

Docket No. 324

PRESTON A. TATE,

Petitioner

vs.

HERMAN SHORT, CHIEF OF POLICE,
HOUSTON, TEXAS

Respondent.

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SUPREME COURT, U.S.
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Place Washington, D.C.

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C O N T E N T S

ARGUMENT OF:

PAGE:

NORMAN DORSEN, ESQ.

On Behalf of Petitioner

4

JOSEPH G. ROLLINS, ESQ.

On Behalf of Respondent

20

REBUTTAL ARGUMENT OF:

NORMAN DORSEN, ESQ.

On behalf of Petitioner

35

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

3 -----
4 PRESTON A. TATE, :

5 PETITIONER :

6
7 vs. :

No. 324

8
9 HERMAN SHORT, CHIEF OF POLICE, :
HOUSTON, TEXAS :

10 RESPONDENT :
11 :
12 :
13 -----

Washington, D.C.

14 Thursday, January 14, 1971

15 The above entitled argument came on for dis-
16 cussion at 11:05 a.m.

17
18 BEFORE:

19 WARREN E. BURGER, Chief Justice
20 HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
21 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
22 BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
23 HENRY BLACKMUN, Associate Justice
24
25

1 APPEARANCES:

2 NORMAN DORSEN, ESQ.
3 New York City
4 On Behalf of Petitioner

5 JOSEPH G. ROLLINS, ESQ.
6 Senior Assistant City Attorney
7 Houston, Texas
8 On Behalf of Respondent

9 *****

1 P R O C E E D I N G S

2
3 MR. CHIEF JUSTICE BURGER: We'll hear arguments
4 next in Tate against Short, Mr. Dorsen, you may proceed when-
5 ever you're ready.

6 ARGUMENT OF NORMAN DORSEN, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. NORMAN DORSEN: Thank you, Mr. Chief Justice,
9 and may it please the Court.

10 This case, arising in Texas, is a sequel to the de-
11 cisions last term in this Court in Williams v. Illinois, and
12 Morris v. Schoonfield. It involves the imprisonment of an indi-
13 gent for inability to pay certain fines imposed for traffic
14 offenses.

15 The facts are not in dispute. Petitioner, Mr. Tate,
16 committed several traffic offenses in 1966. These offenses in-
17 cluded driving without an operators license, driving a car with
18 expired license plates and going through a red light. Neither
19 alone, nor taken together, were these offenses punishable by
20 a jail sentence.

21 They were punishable---

22 Q How many times was he arrested for driving a car
23 without an operators license?

24 A There were nine offenses.

25 Q Operators license.

1 A I think there were three of those.

2 Q Any indication why he didn't go down and get a
3 license?

4 A No, there's nothing in the record on that.

5 Q How much do they cost in Texas?

6 A I don't know that state. Probably ten dollars of
7 so. Two dollars, I'm sorry.

8 Q Two dollars.

9 A Neither alone, as I said, or taken together,
10 were these offenses punishable by a jail sentence. Petitioner
11 was tried on two of the traffic offenses and 1966 in the Houston
12 Corporation Court. A court whose jurisdiction is limited by
13 statute, to offenses punishable by fine alone.

14 He was convicted on the two offenses and fined \$75.
15 But the judgement was not executed. This was explained by Pe-
16 titioner at the subsequent habeas corpus hearing on the ground
17 that he had paid a lawyer to appeal the convictions.

18 In fact the lawyer failed to perfect the appeal. If
19 the appeal had been perfected, the Petitioner would have been
20 entitled to a trial de novo, in the County Court, and relieved,
21 at least temporarily, from the obligation to pay the fines.

22 Instead, as I have said, the convictions became
23 final, but there's nothing in the record to indicate that the
24 Petitioner ever knew that this had occurred.

25 Petitioners' attorney, incidentally, has since been

1 disbarred for other reasons.

2 Petitioner was not tried on the remaining traffic tick-
3 ets until August 7, 1968. He appeared then at the same Cor-
4 poration Court. The Court with jurisdiction only to punish by
5 fines. And he pleaded guilty to the other charges.

6 The judge imposed fines, which, when added to those
7 outstanding from 1966 totaled \$425. Petitioner, being indigent,
8 was unable to pay the fine. Pursuant to Texas statutes, and the
9 Houston Code, he was dispatched forthwith to the Houston Prison
10 Farm to serve 85 days in jail, or one day for each \$5 of the
11 fine at the statutory rate in Texas.

12 Relevant statutes are found on page 3 of our brief.

13 Now this was on August 7, 1968, on August 28, 1968,
14 Petitioner commenced a habeas corpus action and was released
15 the same day on a bond posted by a friend.

16 He had served 21 days and the unpaid fine was now
17 \$321 which would subject him to 64 additional days in jail.

18 Q That same friend didn't help him out with the
19 fines?

20 A No, he did not, Mr. Justice Black.

21 The hearing on the habeas corpus petition was held
22 in the county Criminal Court on August 30, excerpts from the
23 record of which appear on the back of Petitioners brief, not
24 in the brown appendix.

25 The Certiorari Petition contains the entire record

1 of the habeas corpus hearing.

2 The County Criminal Court denied the habeas corpus
3 petition and the Texas Court of Criminal Appeals affirmed and
4 the case then came here on Certiorari.

5 There's one further important factor or point I'd like
6 to make at the outset. Although the State, in its brief seems
7 to dispute the fact that Petitioner was indigent as of August,
8 1968, when he was sent to jail for nonpayment of a fine, it is,
9 in fact, perfectly clear from the record that the State had
10 stipulated, during the hearing and the habeas corpus petition,
11 that Petitioner was "poverty stricken, and that his whole family
12 has been for all periods therein, and probably always will be."
13 This is in the Appendix brief, page 7A.

14 Q Did he own a car?

15 A That does not appear in the record. The reason
16 that that was not explored, Mr. Justice Marshall, is that the
17 garnishment provisions in the law of Texas exempt levying on
18 the car of a married man, so that car couldn't have been used
19 to pay---

20 Q Well, he could have sold it-

21 A Well, he might have done that.

22 Q Well, what happens if a man has 64 charges of
23 driving without a license, reckless driving, and doing bodily
24 harm with an automobile? And he's broke?

25 A Well, the first thing that has to happen is that

1 if he has no money, the court, the lower court, the criminal
2 court as this Court has said in the Williams case last year,
3 there are several alternatives.

4 One is, if he has the possibility of earning some
5 money, to stretch out the fine over a period of time.

6 If that won't work, another alternative is to find
7 a job for him, or put him to work on a prison farm, or some-
8 thing of the sort, but not to confine him, 24 hours a day.

9 Q Working on a prison farm isn't confining him?

10 A Well, what I had in mind there is the ABA;
11 in its minimum standards of sentencing, provides, they call that
12 partial confinement. The study by the ABA concluded that in
13 the case of the fine---

14 Q Well, I'm sure Texas doesn't have one.

15 A No, they do not. They do not.

16 Q Would that be constitutionally any less offensive
17 if he were only confined 12 hours a day instead of 24?

18 A Well, if he were confined only for the purpose
19 of having him work out on a job the fine, we suggest it would
20 not be constitutionally offensive.

21 In other words, if the man cannot pay, if it's clear
22 as Mr. Justice Marshall's hypothetical put it, he wasn't able
23 to pay, our first constitutional requirement following the
24 Williams opinion is that perhaps he might pay if the fine is
25 stretched out over a period of time.

1 Q Wouldn't that be something at least resembling
2 involuntary servitude if the sentence of the court was that
3 he spend 12 hours a day at the local prison farm, at least 8
4 hours of which would be spent working at \$2 an hour?

5 A I don't think it would be because, of course,
6 there is a specific exception in the Thirteenth Amendment for
7 persons convicted of a crime, but even more important than that,
8 we are not claiming, I wish to be perfectly clear, we are not
9 claiming that the state is powerless to get at the kind of
10 person that Mr. Justice Marshall's question referred to.

11 We say that the state can take certain action. The
12 first thing that they can try to do is use the installment method,
13 if that doesn't work, if there's no likelihood that the install-
14 ment method would work, the kind of arrangements for working
15 off the fine over a period of time might be an alternative.

16 Now the ABA, the commission to study the Federal
17 Penal Code, all examine this extremely difficult problem.
18 Because on the one hand, as I've indicated the state should
19 not be powerless to proceed against the individual.

20 On the other hand, the underlying principle of the
21 Williams case, as I understand it, is that for the person who
22 is without funds to put him into jail immediately, which is what
23 happened here, there was no hearing, there was no exploration of
24 the possibility of using these other techniques.

25 We say here that in a situation like this, the Court

1 should deal carefully, to use the phrase that Mr. Justice White
2 used in his concurring opinion in the Morris case, with a man
3 who is without funds, not exempt him, because as I think the
4 Chief Justices opinion pointed out there could be a reverse
5 discrimination in the case of a person who's indigent who won't
6 be able to be proceeded against in any way at all.

7 We are not claiming that. We're saying that if a man
8 has, as this man had, fines totaling \$425, or whatever the
9 sum would be, that the lower Court must deal with that person
10 individually.

11 There must be a hearing, this also is suggested by
12 the ABA and by the commission to reform the criminal law, and
13 deal with him in terms of his particular situation.

14 It's possible in this case for example, since he
15 was getting a vererans' check of, I think, of \$104 a month,
16 that he would have been able to pay out the fine, say \$5 a week,
17 or something of the sort.

18 The infirmity in the procedure here, we're suggesting,
19 is the immediate transference of an individual who is poor,
20 to jail, without exploration of the various alternative methods
21 that were viewed in the Williams case.

22 Q Well how did this get up to this \$425 figure?

23 A Pardon me?

24 Q The \$425 fugure. I would assume if he got \$100
25 a month he could have paid the \$2 fine.

1 A Well aparently---he had a wife and two children,
2 and \$104 a month---

3 Q Well, for example, he could have bought a little
4 less gasoline, and paid the \$2 fine.

5 A Well---

6 Q And I could suggest some other things he could
7 have done. I---

8 A Well---

9 Q I'd --- it with gasoline.

10 A Well---

11 Q But I mean a \$2 fine is different from a \$100
12 fine.

13 A I think that's right, the problem we have on
14 this record, Mr. Justice Marshall, which is from another point
15 of view is relevant to the question you're raising, is that the
16 trial court did not do what we say is constitutionally required,
17 and that is explore the very questions that you're raising.

18 What we're saying is that the lower courts in these
19 situations cannot just take a person who hasn't got the funds
20 and put him in jail. Period.

21 We're not disputing the implications of your questions,
22 as I understand them, Mr. Justice. We're saying that as the
23 Williams case said, the choice is illusory for a man without
24 funds. That does not mean he should be exempt. I want to em-
25 phasize that again and again, because I think that's a critical

1 factor in cases of this kind. But that the lower court cannot
2 just take him and put him in jail.

3 That more is required by the Constitution to fulfill
4 the mandates of the case as cited in Williams and the philosophy
5 of the Williams case itself as I read it.

6 Q And that more you say, Mr. Dorsen, could be met
7 by Texas if it showed upon investigation, find that this man
8 is not able, to be sure, to pay the whole \$425 now, but that
9 he can reasonably afford to pay \$10 a month, because he does
10 get it---

11 A That's correct.

12 Q At the very least \$104 a month from the---

13 A That's correct, sir.

14 Q The Veterans Association.

15 A That is correct, sir.

16 Q Whether or not he's employed, and---

17 A That is correct, sir.

18 Q So then they order him to do that. Then he doesn't
19 pay the \$10 a month, can they then put him in jail?

20 A Well, we would say in a case like that, that
21 the court should then hold the kind of informal hearing---

22 Q Well, it's had the hearing and it's found that
23 he can afford to pay \$10 a month, out of \$104 a month. Then
24 he doesn't pay it. Then can they put him in jail?

25 A I would say that's a case of wilfull refusal to

1 pay, and they can put him in jail.

2 We are not claiming a case like that and I think the
3 Chief Justice---

4 Q And even this Court, which under Texas law has
5 not power to do anything but fine people, as you point out,
6 nonetheless, you concede that under the Constitution it could
7 put him in jail if he didn't pay the \$10 a month, right?

8 A We would concede that the wilfull refusal, and I
9 think it's pertinent in that connection, I'm glad that became
10 clear that---

11 Q ---and help me out in this respect. I'd like to
12 change the facts a little bit. I suppose if the statute were
13 only one sided, that for this offense, 10 days in jail, would
14 you be here then, rich or poor?

15 A If the fine were only \$10?

16 Q No, if there were no fine. If the statute were
17 10 days in jail for this offense. The statute or ordinance.

18 A I assume we would not be.

19 Q You would not be here? I guess my question then
20 is, if you were to prevail here, in this lawsuit, would not the
21 resulting tendency in ordinances and statutes be to make all
22 these offenses punishable only by imprisonment?

23 A There might be such a tendency. It's hard to
24 speculate about what would happen in each state, the fact of the
25 matter is, I think, Mr. Justice Blackmun, that many states now

1 provide for the kind of arrangement that we are suggesting,
2 and some of those, I understand, have not changed the law re-
3 garding to sentencing, but I would like to emphasize one other
4 point which is related to your question.

5 The state makes much of the point, and I think per-
6 haps one or two of the questions that have been asked indicate
7 a concern about it, but this is a scoff-law. That this is a fel-
8 low who is just oblivious to the restrictions that all of us
9 would feel are binding in connection with operating a motor ve-
10 hicle, or a license.

11 And therefore perhaps he should go to jail. Now our
12 position on that is twofold. One, that the state, as you suggest
13 can provide for jail sentences, in cases of this kind. Repeat-
14 ers, people who are chronic violaters. The legislature of the
15 state of Texas has not chosen to do that.

16 The second point, but we are emphasizing that that
17 would be a perfectly valid mode of correctionsl philosophy.
18 The second point we would emphasize on this problem, to use
19 the word that the state uses, this scoff-law, is that if people
20 are going to go to jail, for being scoff-laws, rich people
21 should go to jail as well as poor people.

22 That if a fellow were a playboy, a fellow who had
23 some money and in one way or another violated the traffic laws
24 of the state of Texas, and I assume there have been some people
25 who have done that, in Texas as well as in New York and in other

1 states, we say that the laws should be applied equally, to the
2 rich and the poor.

3 Texas could decide to put them in jail. We are not at
4 all disputing that power. In this connection---

5 Q What you're suggesting here, is that if you pre-
6 vail here, you may provide an impetus for just that thing, and
7 of course it ties in with the thinking of some people that one
8 of the solutions to our traffic carnage is to impose stiffer---

9 A That may well be.

10 Q ---regulations.

11 A I would not dispute that, is in the original
12 question. I might say, in connection with the terms of the states
13 interest, the state at several points, and very understandably
14 from its viewpoint, suggests that this would be terrifically
15 inconvenient for the state to do.

16 Terrifically inconvenient to do the kinds of things
17 that the ABA has suggested, that the commission to reform the
18 federal law, the federal criminal code has suggested, that
19 Maryland now does, that Delaware does, that California does.

20 Now we say that that is, that the inconvenience
21 problem is, to use the vernacular, a red herring. That all the
22 state already has a probation apparatus, it already has people
23 who are concerned with sentencing, the statutes of the state
24 of Texas provide, incidentally, installment payments of fines
25 above \$200 in another connection.

1 If you are fined above \$200 and as a condition for
2 probation, the court is empowered under the Texas criminal code
3 to provide for installments, that the state doesn't find that
4 inconvenient.

5 And the American Bar Association which went through
6 all of this at great care, concluded that it is not too much
7 to ask, in the interest of equal protection, to treat the people
8 without funds a little bit more carefully.

9 I might say, I passed the point by, I suppose it might
10 have been implied in what I said, that this case is really like
11 Williams in the critical respect that the maximum sentences
12 that can be provided in offenses of this kind is zero days.
13 Which brings it within the opinion of the Chief Justice and
14 the concurring opinion on the due process theory by Mr. Justice
15 Harlan.

16 The amicus curiae, I might say, the National Legal
17 Aid and Defender Association, which has come into this case,
18 amicus curiae suggests that this is even a worse case than
19 Williams, a more severe deprivation of constitutional rights,
20 because here you're not just adding to an existing jail term
21 which is substituting jail for a pecuniary penalty.

22 Q What is the maximum total aggregate fine, he did
23 get up to \$425, how much could he have been fined? A thousand
24 dollars?

25 A It's not clear on the record. The maximum that

1 this Court could impose for any offense is \$200.

2 Q Per offense.

3 A That's right. So \$1800 presumably would have
4 been the absolute jurisdictional limit, but they may have ---
5 their limits --- that.

6 Now there is another aspect to this case. It's not
7 a principal point, but we would like to stress it. It is the
8 idea that exchanging a man's freedom for \$5 a day, strikes us
9 itself as being implicitly irrational.

10 When one thinks about how any person in the middle
11 class, or with comfortable means, or just not an indigent, would
12 feel about his freedom, and to translate that precious thing,
13 being perhaps the most precious thing we have, for \$5 seems to
14 us over the line.

15 And of course the American Bar Association in rather
16 strong language made a similar point in which it said, I think
17 it's on page 12 of our brief, that, page 16, I'm sorry, page
18 16 of our brief, saying it even more strongly than we do, that
19 "the exclusive use of a dollar-a-day ratio both presents the po-
20 ssibility of a brutally long sentence, and provides as a meas-
21 ure ab arbitrary figure which makes no economic sense, and
22 which bears no relation to the factors which ought to govern
23 the choice as to the length of the sentence."

24 Q When was this statute --- in Texas? is it some
25 statute from back---

1 A Well, it 's a rather old statute, I believe.

2 Texas law a hundred years ago, in 1850 had a statute which pro-
3 vided for installment of some kind, but was repealed---the
4 state will correct me on that. It's not a new statute in the
5 state of Texas.

6 Q But I suppose you'd agree in terms of the econ-
7 omic argument you're making that at the turn of the century
8 \$5 a day might not have been irrational,---

9 A Well, that's correct. We're not making a moral
10 judgement on the legislature of Texas in enacting this claim.
11 I think perhaps notions of fairness have changed as well as a
12 decline in the value of a dollar.

13 And it seems to me, that one court, an Ohio court
14 incidentally, held, we cite the case in that long footnote on
15 page 16, that \$3 was irrational, we would say that \$5 a day
16 was just unacceptable in terms of fundamental and fairness---

17 Q Those would be the same if it was a thousand
18 dollars a day, your argument would be the same---

19 A That's right. I'm just emphasizing this other
20 aspect which is a separate point, and is not, as you point out
21 our principal point.

22 Q I construe from your argument that he could be
23 put on a state prison farm and required to work 8 hours a day
24 at a \$2 an hour rate, or something, perhaps something geared
25 to the minimum wages under the Federal Act---

1 A That's right.

2 Q That he could also be put on a road gang, on a
3 construction job, or any other work under compelled state super-
4 vision.

5 A I think he could be. I would not think that the
6 state should use that as its first alternative. I think it
7 should follow the recommendations made by the American Bar
8 Association, and the commission, that---

9 Q You say the state should follow, are you then
10 talking in terms of advice to the state legislatures, how
11 can this Court or any court give advice to the state legis-
12 latures?

13 A I did not mean to put it that way. What I'm
14 suggesting is that we deal here with the deprivation of liberty.
15 It seems to us fully consistent with this Courts opinions in
16 a variety of cases that the state should use the least restric-
17 tive means in enforcing its laws.

18 Now this fellow, as we discussed earlier, happened to
19 be someone who was of a special kind, perhaps, but that does
20 not mean that he's an outlaw, that he should be condemned tot-
21 ally.

22 He should be given an opportunity to pay off. And he
23 could have, perhaps, and incidentally this is relevant to our
24 second principal point, and that is that the lower courts in
25 these cases, respectfully, have to hold some kind of hearings

1 some kind of proceeding to find out what's happening in these
2 cases. And it cannot be just mass produced justice and an auto-
3 matic incarceration. If I have any time left, I'd like to just
4 reserve a minute or two, if I may, thank you.

5 ARGUMENT OF JOSEPH G. ROLLINS, ESQ.

6 ON BEHALF OF RESPONDENT

7 MR. ROLLINS: Mr. Chief Justice, and May it please
8 the Court.

9 At the outset, we would like to discuss what this
10 case does not concern. It does not concern any troubles that
11 Preston A. Tate may have had with his lawyers. We think that
12 that is not in the case. Nor does it involve any arbitrary
13 action on the part of the State of Texas in charging two dollars
14 for a drivers license.

15 That is not in the case. The case actually boils down
16 to the fact that this man, Preston A. Tate, ran a red light
17 in the city of Houston, and the policeman stopped him, and it
18 is part of our routine procedure they asked him to show his
19 drivers license.

20 He didn't have a drivers license. He went into Cor-
21 poration Court, he plead Not Guilty, the jury fined him \$50 on
22 one offense, they could have gone up to \$200. They fined him
23 \$25 on the other.

24 That very same day, at 6:00 p.m. that evening he
25 ran a stop sign and fortunately a policeman saw him and stopped

1 him and again he was arrested, and then subsequently, he ran
2 up a total of nine traffic offenses.

3 Q Did I understand you to say that Texas found him
4 guilty of two offenses for not having a drivers license on a
5 single day?

6 A No sir, the day of his trial, the day that the
7 jury found him guilty and fined him a \$50 and a \$25 fine, that
8 same evening, the offense had occurred a week or so earlier, but
9 on the day of his trial---

10 Q ---and he was coming home from his trial.

11 A I doubt it Your Honor, because it was 6:30
12 something p.m., and I don't believe that he would be coming
13 home from a trial, but nonetheless, it was the same day. He
14 ran a stop sign and again was given a ticket, he wasn't arrested.

15 And that is something else that we would like to point
16 out here, they say that he was immediately and forthwith taken
17 to jail. He ---over two years expired between the time of these
18 offenses and the time of his habeas corpus hearing. And although
19 he might have had a wife and child at the time of the habeas
20 corpus hearing, he had no children when he committed these of-
21 fenses, in other words there was enough time lag in there for
22 him to have fathered two children.

23 So I don't think the state of Texas has really been
24 forthwith on this thing. In fact I think perhaps if we were to
25 be criticized we could be criticized in dragging our heels and not

1 bringing this thing to a head before now.

2 Another thing in the Petitioners brief, they question
3 the jurisdiction of our Corporation Court, and I think he an-
4 swered his own question when he stated that the Corporation
5 Court could put a man in jail after he had failed to pay his
6 installments.

7 Well now, if we can put him in jail after failing to
8 pay his installments, we could---we would have the jurisdiction
9 beforehand, and besides, our Texas Supreme Court and Texas
10 Court of Criminal Appeals says the Corporation Courts and the
11 J.P. Courts have the right to enforce their orders by incar-
12 ceration and I don't think that it would serve any purpose
13 to argue that further.

14 The---

15 Q What effort was made during this year or two to
16 collect the fines?

17 A That, Mr. Justice Marshall, I don't know.

18 Q Well now, at the hearing when he was sent away,
19 what happened there, other than "You don't have the money, so
20 you go."

21 A Yes, sir, that's it.

22 Q That's all?

23 A Yes.

24 Q Well, would it have been possible to find out
25 whether he could have paid it in installments?

1 A Well---

2 Q Obviously the judge could have asked one ques-
3 tion, can you pay this \$10 a month, or---

4 A There is no provision in our law for paying a
5 misdemeanor of this type out in installments.

6 Q Is there anything in the law that prohibits it?

7 A I---

8 Q I would assume in this particular case, if the
9 judge had said on the day he was fined \$75, you have got two
10 years to pay this \$75, there would have been no question about
11 that, you could do that under the Texas law, couldn't you?

12 A Two years?

13 Q Yes.

14 A I don't believe, Mr. Justice Marshall, that---

15 Q Is that what happened, it was two years before
16 they got around to asking him for it?

17 A It was two years before they---actually what
18 happened here, they had some capiases out on him, on some of
19 these other subsequent offenses and they finally arrested him,
20 they finally ran him down.

21 Now whether we didn't run hard enough or not, I don't
22 know.

23 Q Oh, you didn't deliberately delay it, I didn't---

24 A No, sir. In fact he was, as I say, and I was not
25 on this case at the trial court level, and I'm not as familiar

1 with the facts as I should be, but my understanding is, that
2 there were about 7 capiases working on him simultaneously,
3 our whole police department was looking for him.

4 Q Did he ever open a defense for these cases?

5 A Seven of them were nolo contendere, and the two
6 that he plead not guilty on, two the jury found him guilty,---

7 Q What was his defense?

8 A I don't know, sir, I don't know, but when a per-
9 son gets caught red handed running a red light---

10 Q ---what his defense was, or has been?

11 A In the habeas corpus hearing the only defense
12 was that he was too poor to pay the fine.

13 Q To pursue Justice Marshalls question about in-
14 stallment payments, I assume Texas charges interest on its out-
15 standing fines, doesn't it?

16 A No, sir, we do not.

17 Q So at least he doesn't have \$3 a month interest
18 running on---

19 A No, sir.

20 Q On that ten dollars.

21 A And to continue with Justice Marshalls question,
22 I don't believe that a justice of the peace would have the au-
23 thority under our law to set up his own little timepayment plan.
24 I don't believe that when the law says that the fines shall be
25 collected in a certain manner, I don't believe that each JP in all

1 of our many counties could set up his own little empire, so
2 to speak, on how he's going to collect his fines.

3 Q I assume you also make the point that it's dif-
4 ferent than when he was first picked up and convicted,, and got
5 \$75 that the judge had said either this or you go to jail.

6 And this case, where by the time they got around to
7 him he had nine other charges against him, I think those are
8 two different cases. Don't you?

9 A As far as equities, yes, but as far as the law is
10 concerned we think that---and the man could have---if he had
11 just obeyed the law, right there, none of this trouble would
12 have happened. But he chose to disobey the law, he chose to
13 drive without a drivers license for---he admitted on the habeas
14 corpus 2 1/2 years, and as of last week, he hadn't got a drivers
15 license yet.

16 And we don't think that, of course, as far as the
17 question of law involved, the degree of a mans perversity pro-
18 bably shouldn't have anything to do with it, but nonetheless,
19 it certainly should be something that we should not be blind to.

20 Q My point is this same judge does have right of
21 probation, and do you not have a probation department in Hous-
22 ton?

23 A No, sir, not on this---

24 Q No, but I mean you do have a probation department?

25 A The District Attorney does have a probation de-

1 partment, but on this type of thing, the --- city ordinance
2 which allows the judge to delay action on the fine 30 days.

3 Q I see.

4 A Upon application of the defendant. He did not
5 do this.

6 Q How do you distinguish the Williams case in last
7 term from your case?

8 A Your Honor, the Williams case, by the specific
9 language of the Court, and I think at least 10 times in Mr.
10 Chief Justice Burgers opinion he emphasized that what the
11 Court was condemning in Williams was an instance where they
12 had a statute which provided for imprisonment regardless.

13 In addition, in this same statute, there was a pro-
14 vision for a fine. And what this Court said, at least the way
15 I read it, and I believe that's what the concurring opinion in
16 the Schoonover case also said was their interpretation of it,
17 was that this Court said that when you translate a fine into
18 equivalent jail time, that that cannot extend beyond the maximum
19 jail time provided in the statute.

20 That was what was before the Court, they---I believe
21 you all said that you had a very limited question, and that's
22 what you decided on.

23 But I was impressed by the number of times that Mr.
24 Chief Justice Burger, in his opinion, kept referring to that
25 circumscription of the case to cases where it extended the total

1 incarceration period beyond the period set forth in the statute.

2 And in this case, this is a case where the only sanc-
3 tion for violation of this statute was a fine only. We submit
4 and we think we have shown it in our briefs that in cases like
5 this that our other statutes which provide that upon failure
6 to pay a fine you may be laid out in jail at \$5 a day, we think
7 these two statutes should be construed in pari materia, in other
8 words to show that the legislature intended that the man should
9 not get off scott-free.

10 But, that if he would pay the fine, that's fine, if
11 he couldn't then he would have to lay it out in jail.

12 Q Mr. Rollins, in the Appendix of the opinion of
13 the Court in Williams, last year, there was an effort to sum-
14 marize what various states did, and as to Texas, of course it
15 didn't purport to be complete, but it was recited that he made
16 the Defendant found guilty and fined may be put to work or im-
17 prisoned for a sufficient length of time to discharge the am-
18 ount. Is there a provision, a work-out provision under Justice
19 of the Peace fine, or---

20 A Your Honor, I can answer that for the city of
21 Houston, that we have an ordinance that provides that if he will
22 voluntarily go to what we call our P farm, he can work that out
23 at \$7.50 per day. Tate refused to go to the P farm, incidentally.

24 Q Does that appear in the record?

25 A Was that in the Habeas corpus, it's not in the

1 record,

2 Q Well, that's rather an important aspect in view
3 of what was said in the Williams case about alternatives, wouldn't
4 you think?

5 A Your Honor, the, actually as far as principle is
6 concerned, I don't see that there's any difference in incar-
7 cerating him where he can just lie around in jail and talk to
8 the boys in the cell, or go out and work on a prison farm.

9 Its---

10 Q Well, maybe conceivably take a different view of
11 the matter.

12 A Yes, sir, that's obvious, sir, but I---you asked
13 me the question cold, I can't see that---the principle is
14 that the man is being restrained obviously it would be in-
15 voluntarily.

16 Q Mr. Dorsen certainly didn't argue that there
17 was anything constitutionally unpermissible, you will recall,
18 and---

19 A But I couldn't understand---

20 Q ---that---said he would agree with that, but
21 since all of the treatment of this difficult problem has dealt
22 in terms of alternatives, it's conceivable that even at the rate
23 of \$1 an hour, which Texas allows, plus presumably some food,
24 on a work out day, you might have a different case than the
25 case you have without that evidence on the record.

1 A Your Honor, did you say \$1 an hour?

2 Q \$7.50 a day.

3 A Oh. That's a city ordinance.

4 Q That's roughly a dollar an hour and I suppose
5 they give the man something to eat when he's doing this work.

6 A Yes, sir, I can say that we feed real good.

7 Q Well, that might be quite a different case from
8 the one you have here.

9 A Your Honor, I cannot see the difference. The man-
10 well, what would be the difference, then, may I answer that
11 question by asking a question?

12 What about a chain gang? And leased him out to a
13 private road contractor, and say that if you go out here and
14 work on this chain gang, out in the hot sun, well, we'll let
15 you off a lot sooner. I can't see the difference in principle
16 in the idea is that the man is being restrained from getting
17 out in society.

18 That is his punishment, and we believe that in a
19 case like we have here, where the legislature has stated that
20 the sanction shall be a fine and another statute which we think
21 ought to be construed in pari materia, that if he does not pay
22 the fine, then he has to go to jail.

23 We think that that is entirely different and we would
24 submit, there's two early cases out of California which we did
25 not include in our brief but I would like to submit to the Court,

1 it's in re Wadley, in 23 Pacific 190, and in re Rosenheim, 23
2 Pacific 372.

3 Q Could you furnish us with a memorandum of those
4 so I---

5 A Yes, sir, I certainly will, and Your Honor, I
6 would like to point in the Wadley case, in a concurring opinion
7 Mr. Justice McFarland mentioned that there, or classified that
8 there are three types of sanctions for misdemeanor fines: im-
9 prisonment only, fine only, and imprisonment plus fine.

10 In in re Rosenheim, there was a situation very sim-
11 ilar to the situation that was before you all in Williams.
12 And the Court there, in the California Court, said that the
13 language of the statute had an ambiguity because if the legis-
14 lature had really wanted or had clearly wanted the fine to be
15 transmuted to jail time and added on to the imprisonment time,
16 they could have clearly so said.

17 But that they didn't. And that the misdemeanant had
18 a constitutional right for California to pursue its policy of
19 strict construction of the statute against the state and for
20 the prisoner.

21 In whichcase, and they further stated that if the
22 loose construction, that if the state wanted in that case,
23 were followed, then it was possible for a judge to do by in-
24 direction what he could not do directly.

25 And I believe you all used that same phrase in Williams.

1 Q Mr. Rollins?

2 A Yes, sir.

3 Q How long have you had your P farm orders?

4 A Long before the times germaine here.

5 Q Judicially noticeable?

6 A Your Honor, in Texas, city ordinances are not---
7 our Supreme Court and our District Courts do not take judicial
8 notice of city ordinances, they do of city charters.

9 So in strictly legal point of view, I would presume
10 that a court could not take judicial knowledge of city ordin-
11 ance which sets up---

12 Q ---is to judicial notice doesn't necessarily go-
13 vern what the law might---as to judicial notice.

14 A Well---

15 Q Why don't you supply us with a citation of those
16 ordinances or copies of them, when you give the other citations---

17 A Yes, sir.

18 Q As the Justice has suggested.

19 A Yes, sir. It is in the city code, and if the
20 Supreme Court can take judicial knowledge of our city of Hous-
21 ton code well, the problem is solved.

22 Q Even if we can judicially notice those factors,
23 we can't judicially notice that the record in the habeas corpus
24 proceedings shows that he refused to take this alternative. In
25 fact the record is blank on the---

1 A No, sir, if it's not in the record I don't
2 think you can.

3 Q Is there any---was that before the Texas Appellate
4 Court, or---

5 A Your Honor, I don't know, I don't think it was.

6 Q Well, I have no idea whether a motion to sup-
7 plement the record would be granted or not, but you certainly
8 are free to make such a motion.

9 A Yes, sir, I will certainly do so. And Your Honor,
10 in what little time I have remaining, I would like to protest
11 very vigorously about this idea of making the state of Texas,
12 or the city of Houston, or any other state, kind of adopt, a---
13 I guess it's going to be something like the American Automo-
14 bile Association has for their subscribers.

15 They go out and pay the fines for you, and this is
16 all just part of the service. We don't think that the Fourteenth
17 Amendment by the wildest stretch of the imagination could re-
18 quire a state to set up a credit card classification of petty
19 crimes and misdemeanors.

20 Q Well, are you referring now to the installment
21 plan?

22 A Yes, sir. In other words, that's really what
23 you're asking is that what he's asking is that the sheriffs and
24 the chiefs of police just set up credits with people like Pres-
25 ton Tate, and let him pay it out at so much a month.

1 Then how---it's going to take the wisdom of Solomon
2 and the sophistication of a computer that hasn't ever been
3 invented to correlate the mans family size, his personal sen-
4 sitivity, his, the value of his car which he has committed the
5 crimes with and all of that into a jumble and come out and
6 say that all right, now, for you it's going to be \$4.75 a week.

7 And then does he propose that in addition to having
8 Solomon sit in judgement on this then we have another hearing--
9 say that I have a \$2 parking meter violation in the city of
10 Houston and I go down there and say I'm too poor, then are we
11 going to have a separate hearing on my guilt velle non, and
12 then another hearing on whether I was telling the truth when I
13 said I was too poor?

14 And if I was just about half right on the too poor,
15 well then is the judge going to have to figure out how we are
16 going to space those payments out?

17 And another thing; if we have these installment pay-
18 ments, the people are going to start getting behind, that's just
19 human nature, then we're going to have all sorts of civil rights
20 cases coming up about the way our deputy clerks go out and try
21 to collect the fines. That they used harsh language, and we
22 think that this is just leading us to a --- bog that we never
23 will see our way clear of.

24 And I think that before we stretch the Fourteenth
25 Amendment to mean something that clearly was not written in it,

1 I would like to leave in parting with the idea that the poor
2 people in Houston, Texas, outnumber the rich, they've got the
3 ballot and the suffrage and if they think the way we collect our
4 fines is wrong they can elect city councilmen and state legis-
5 lators to change the law.

6 That the poor people of Texas have not done so, would
7 be indicative that this law and the way we carry it out is
8 not oppressive and is not unworkable. But especially since the
9 Fourteenth Amendment did not have the---and I would like also
10 to point out that the same Congress that wrote the Forteenth
11 Amendment was also the same Congress that passed on our Con-
12 stitution and that we had to submit that Constitution and ratify
13 the Fourteenth Amendment before we could get back in the Union,
14 that same Congress that wrote the Fourteenth Amendment thought
15 our state constitution was all right.

16 And we submit that this is strictly a matter of local
17 concern, and that it would be beyond the wildest stretch of the
18 imagination to require the state of Texas to, and the city of
19 Houston to set up this installment payment, but, Your Honors,
20 if you do, please tell us exactly how to work it. Because
21 the District Courts are going to be working overtime, each one
22 with a mutually conflicting subjective idea what a proper
23 installment should be and proper collection procedures should
24 be, and I can see more three-man courts being convened all over
25 Texas and all over the nation for that matter, trying to deter-

1 mine whether the installment payment met the cost of living
2 index, or whether we should go on the guaranteed minimum in-
3 come, as an index for fiscal and penal responsibility, and
4 then Your Honor, I would like to add one thing.

5 What about the people that just won't pay? We ought
6 to have some right to do that, and we submit that this is where
7 the problem is, with our people and our legislators. Thank you.

8 Q Do you have any law in Texas to provide for for-
9 feiture of automobiles that are used by people constantly?

10 A No, sir. A married mans automobile is not subject
11 to execution. We had a populace inspired legislature in the
12 early 1880s that took care of what the Constitution didn't
13 take care of, and if a married man in Texas is prudent enough
14 not to have a bank account, he can go free.

15 Q Mr. Dorsen?

16 REBUTTAL ARGUMENT OF NORMAN DORSEN, ESQ?

17 ON BEHALF OF PETITIONER

18 MR. DORSEN: Thank you, Mr. Chief Justice. I think
19 first of all that some of the catalogues of alleged harms that
20 my friend from Texas has referred to are really unrealistic
21 and I would just refer the quote rather than go into the details
22 cited in our brief. The Schoonfield, which is the Maryland case
23 that was back on remand from the Morris and Schoonfield case
24 in which a Three Judge Court, there were only two judges sitting,
25 but a Three Judge Federal Court reviewed in detail a Maryland

1 statute and showed, I think, very clearly, in that statute and
2 in the way the Court discusses it how this method of collection
3 can work consistently with Williams and with Illinois and without
4 undue burden on the state.

5 I am advised by my co-counselor from Texas that the
6 P farm that was referred to, that is not discussed at all in
7 the record, is not merely what I had first thought what my
8 friend from Texas is referring about, as I understand it from
9 Texas Counsel, that everyone goes to the so-called P farm, but
10 that people who work there, who agree to work, get \$7 a day,
11 for working.

12 Now that's not the same thing that I was suggesting
13 before. Because what we were suggesting before was absent the
14 wilfulness problem which I certainly want to re-emphasize that
15 the state is not powerless under the Constitution to incar-
16 cerate someone who wilfully refuses to pay the fine, but
17 absent that---

18 Q This P farm; is that P., an abbreviation for
19 "prison" or is it Pae, where they grow beef?

20 A I think it's the first, the former. That---
21 we stand on the alternatives as discussed in the Williams case,
22 I want to be very clear about that. The installment process is
23 one process, and the work process is another.

24 A twenty four hour a day confinement is not necessary
25 in the absence of wilfulness to deal with this problem. And as

1 I said a moment ago, the Maryland case and the Maryland statute
2 I think make this abundantly clear.

3 Another case recently decided by the Supreme Court
4 of California almost unanimously, which is in the Appendix to
5 our Reply Brief, the Antazo case reaches the same conclusion.

6 I just want to clear up finally, in half a minute,
7 a timing problem that may not have been completely clear, and
8 this is my final point.

9 And that is that after Mr. Tate was convicted and
10 fined \$75 in 1966, as far as this record shows, and there was
11 no attempt to impeach Mr. Tate's testimony at the habeas corpus
12 hearing on this point, as far as the record shows he had no
13 way of knowing until 1968 that that money was due. His lawyer
14 had been disbarred, and his lawyer apparently had failed in
15 this case also to perfect the appeal.

16 We think, in conclusion, Your Honors, that---

17 Q ---what Mr. Tate's occupation is?

18 A I'm not sure what his occupation was; he had some
19 odd jobs but I'm not sure what his occupation was.

20 Q What kind of car was this, did it show that?

21 A A Chrysler, I don't know the year.

22 Q Does it show the model?

23 A It doesn't show the model. But I was just going
24 to say in conclusion that we regard this case in the essential
25 principles as indistinguishable from the Williams case, and we

1 therefore, respectfully request the Court to reverse the judge-
2 ment below.

3 Q Thank you Professor Dorsen, thank you Mr. Rollins.
4 The case is submitted.

5
6 (Whereupon at 12:00 noon, argument in the above
7 entitled matter was concluded.)

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