In the

Supreme Court of the United States

JAMES B. BRADLEY, JR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 71-1304

Washington, D. C.
January 8, 1973

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v.	:	No. 71-1304
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.
Monday, January 8, 1973

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM P. HOMANS, JR., ESQ., 45 School Street, Boston, Massachusetts 02108; for the Petitioners

PHILIP A. LACOVARA, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 71-1304, Bradley against the United States.

Mr. Homans, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM F. HOMANS, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

This is a petitioner for writ of certiorari to a final order of the Court of Appeals for the First Circuit, which order appears on page 20 of the record appendix herein, in response to a motion for an order vacating sentences and for remand and for motions for stay of mandate, which appear respectively on pages 16, 17, and 18 of the record appendix.

The motions filed by the petitioners in this case filed in order by the Court of Appeals affirming a judgment or judgments of conviction against the four petitioners on the merits following a prosecution for violation of 26 U. S. Code, Section 4705(a), now repealed, and 26 U. S. Code 7237(b).

MR. CHIEF JUSTICE BURGER: Mr. Homans.

MR. HOMANS: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Maybe you could help me a little bit. Is there anything in this record that affirmatively indicates that the district judge did not

consider probation? Can you help me on that?

MR. HOMANS: Yes, Your Honor. The only thing that would appear in this record, may it please the Court, is in the petitioner for certiorari. I believe it appears on page--in any event, as I come to it, Your Honor--

MR. CHIEF JUSTICE BURGER: The judgment and commitment does not indicate--

MR. HOMANS: No, Your Honor, not one way or the other.

MR. CHIEF JUSTICE BURGER: Ordinarily a district judge would not give any indication one way or the other, would he?

MR. HOMANS: No, Your Honor. In the form of judgment which is prescribed, there is no indication one way or another. And off the record, Your Honor--and I cannot go off the record--we did file motions after the affirmance on the merits as distinguished from the so-called appendage to the appeal which is in issue here; we did file motions in the district court on which the district court took no action. And I believe reference to those appears in the docket on page 2.

February 8th motions were ordered vacating sentences and for remand of appellants filed--motion for a mandate filed in Court of Appeals. That is the only indication that such a motion was filed in the district court prior

to it being filed in the Court of Appeals.

In any event, Mr. Chief Justice and Members of the Court, this was a prosecution under the prior drug law which was repealed by Public Law 91-513, effective May 1, 1971.

The indictment which appears on pages 2 through 5 inclusive of the appendix, charged a conspiracy in several of the counts between March 4, 1971 and March 12, 1971, as well as charging under 4705 of former Title 26, all of the defendants with the substantive offense of giving away, selling, or distribution of cocaine.

The indictment, may it please the Court, also charged in counts which are not material here three of the four petitioners with carrying a firearm during the commission of a felony.

The important aspect of this case, so far as the indictment is concerned, is that the indictment alleged that the offense took place between March 4 and March 10, 1971, which was before May 1, 1971, the effective date of repeal as a result of 91-513, Public Law 91-513, of the prior drug law, which contained among other statutes 26 U. S. Code, Section 7237(d), which appears again on page 3 of the petitioner's brief and provides, as Your Honors are aware, that upon conviction of offenses, the penalty--and I emphasize penalty--for which is provided in subsection (b) of the section, that the imposition or execution of sentence

shall not be suspended, probation shall not be granted, and in the case of a violation of a law relating to narcotic drugs, Section 4202 of Title 18, the statute otherwise providing for parole, shall not apply.

I would emphasize in connection with later portions of the argument the language in (d) of 7237, which says: "Upon conviction of any offense, the penalty for which is provided in subsection (b)." Referring back to subsection (b) of 7237, that provides, "Whoever conspires to commit an offense described in 4705(a) shall be imprisoned not less than five or more than 20 years and, in addition, may be fined not more than $20,000."

Thus, may it please the Court, in accordance at least with the language of 7237(d), the penalty appears in section (b).

Again--and I am hesitant to read statutes except that the wording of the various statutes involved here is important to the decision in this case. There are two saving statutes involved, may it please the Court, in this case. The first statute is the general saving statute, United States Code Section 109, which I will read with some emphasis.

"The repeal of any statute shall not have the effect to release or extinguish any penalty"--and I emphasize the word "penalty"--"forfeiture, or liability incurred under

such statute"--and I emphasize the words "incurred under such statute--"unless the repealing act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution"--which I emphasize--"for the enforcement of such penalty, forfeiture, or liability."

That is the general saving statute which has been in the statute books since late in the 19th century unchanged.

The specific statute which appeared in Public Law 91-513 provides--and again I use some emphasis--"Prosecutions"--I emphasize the word "prosecutions"--"for any violation of law"--and I am reading from page 4 of our brief--"occurring prior to the effective date of Section 1101 shall not be affected by the repeals or amendments made by such section..., or abated by reason thereof."

May it please the Court and Mr. Chief Justice, we suggest here that Section 1103(a), the specific saving statute, which I have just concluded reading, controls this case. And under the doctrines of conflict set forth in Hertz against Woodman and in Great Northern Railway against United States, both of which are cited in both briefs and in our brief on pages 9 through 13 of the petitioner's brief, we suggest that the conflict in wording between Section 1103(a), the specific statute, and Section 109, the general statute, is sufficient so that 1103(a) is the only saving statute

which is involved in this case. Later on, if time permits, we shall argue that even if the Court disagrees and 109 applies, the same result should still follow.

But for the moment I address myself, Mr. Chief Justice and Members of the Court, to the effect of the specific saving statute.

Your Honor, Mr. Chief Justice, and the Court will note that 1103(a), the specific statute, refers only to the word "prosecutions." It does not use the words "penalty, forfeiture, or liability." And the contention of the petitioners resolves itself, we suggest, based upon the meaning of the word "prosecution."

The Government urges that notwithstanding the wording of the 7237(d), that both probation, the discretion of the Court to order a suspension of sentence and finally parole under 18 U. S. Code 4202 is part of the prosecution, as the word is used in Section 1103(a). We disagree, and there are reasons both from a policy point of view as well as from a conceptual point of view which we submit in support of our argument.

The cases of Affronti and Murray and finally Ellenbogen, which are cited on page 14 of our brief and they are cited as well in the United States brief, all show that a court does have authority following the imposition of sentence and prior to the execution of the sentence to grant

probation and to suspend sentence. Thus, although it did not take place in this case and it does not take place in most cases, as the Solicitor General correctly points out, had the district court here, for example, sentenced these defendants to five years, not suspended sentence, assuming that he had the power to do so, and thereafter before incarceration and while the case was not on appeal, for example, to the Court of Appeals, if there had been some reason for delay in execution of the sentence, before execution of the sentence, he had then suspended sentence and granted probation, he would have been within the authority which appears very plainly in Affronti and Murray and in the Second Circuit case, Ellenbogen, where that actually took place.

The Government's brief correctly points out that, as Ellenbogen says, normally the imposition of probation and the suspension of sentence should normally take place at the time of sentence. But the Court has authority, nevertheless, to suspend and to grant probation during that interval, if there is an interval, between imposition of sentence and execution.

Thus, sentence being in 99 percent of the cases, as Berman indicates, which is also cited on page 14 of our case, the judgment sentence has concluded, we suggest, the prosecution as of the time that it is imposed. Sentence, of course, as we suggest, looks to the past and the judgment

looks to the past. It looks to the determination of guilt. It looks to the consideration which the trial judge takes into account in determining the term of imprisonment or the amount of the fine. It looks to the prior criminal record, if any, of the defendant or, for that matter, to whatever good work he has done in his life. Whereas, probation looks to the future; probation as an act of grace looks to the opportunity which the defendant may have to rehabilitate himself while, instead of being incarcerated, through the grace of the court and through the act of grace, which is the suspension of sentence and probation, he finds himself, to use the colloquial phrase, on the street rather than incarcerated. So that these are two separate concepts, and the difference, may it please the Court, between probation and suspended sentence as an act of grace, on the one hand, and the imposition of a term of years, on the other hand, as policy matters, is consistent with what we've urged and the Affronti and Murray and Ellenbogen cases show, namely, that there is a difference conceptually between sentence and the discretion of the court or its exercise in granting probation and in suspending sentence.

Q What about parole?

MR. HOMANS: With respect to parole--

Q On existing cases that were final at the time the act was passed, sentences were being served under the old

law. A prisoner wouldn't be subject to parole. Is he under the new law?

MR. HOMANS: This case, may it please the Court, and I am not trying to hedge, does not reach that because, of course, we were sentenced after the repeal.

Q I know, but your argument is that probation isn't part of either prosecution or sentence.

MR. HOMANS: Yes, sir. As to parole, we suggest the question is even clearer. Under the language of this Court in Morrissey against Brewer, which is cited on page 18 of our brief, U. S. 471 at page 480, the Court said parole arises after the end of the criminal prosecution, including imposition of sentence. Therefore, even more clearly than is the case in probation and the--

Q Were we saying any more than night follows day? That was merely an observation about the chronological events.

MR. HOMANS: Yes, Your Honor.

Q But in each case, probation and parole, a sentence is pronounced, is it not?

MR. HOMANS: A sentence has been pronounced, yes, Mr. Chief Justice.

Q They are each under a sentence, and perhaps physically a difference is that the release begins immediately on probation, and it's deferred in parole.

MR. HOMANS: Yes, sir. There are those similarities and, of course, by saying the parole issue is stronger than the probation issue, we certainly do not concede the probation issue. But I would suggest, Mr. Chief Justice, that with respect to parole, the determination, for example, of when parole shall be granted except in the exception provided by 4208(a), is in an executive rather than a--at least for federal purpose--is in executive rather than a judicial body, the board of parole, that the matter, except again in the case of the exception in 4208(a), the matter is not a judicial matter, it is not in the control of the court but is in control of the executive body, and this is consistent with the purpose of parole, to see how the man does during the time he has been incarcerated and taking into consideration his background and thereafter give him the opportunity to remain in a form of custody in what the Court called a variation in Morrissey against Brewer upon imprisonment but again on the street under supervision of his parole officer until the time of his original term has finished.

So that in that sense, may it please the Court, it is like probation in that he has a form of supervision by an employee of the executive, the parole officer. But the determination is made completely separately from the original determination made by the court as to the term of

years or the fine in the few cases where there are fines, the term of years which the defendant will serve. So that again, may it please the Court, we would suggest that the concepts are entirely different, whether you call parole an act of grace or whatever terminology one puts on it.

Nevertheless, there are completely different considerations going into whether a man is paroled than the sentence imposed upon him, whether that sentence is to be suspended or served. Coming back to that for the moment--

Q Rather than calling it an act of grace, would it not be more accurate to say that it is a matter of sound judicial discretion?

MR. HOMANS: With all respect, may it please the Court, parole except--

Q No, I am treating probation now, probation.

MR. HOMANS: Probation, oh, yes, sir, there is no question but that the exercise of discretion to grant probation and to suspend sentence certainly is in the exercise of sound judicial discretion, but it comes, may it please the Court, after the court has already determined this man shall serve so many years. The court then comes to the question of whether it shall exercise its discretion to grant probation coupled with a suspended sentence or a suspension of the sentence which has already been ordered. And as Nagelberg case indicates on page--which we cite--on

page 16, if in the unhappy event the probation is eventually revoked and the sentence is ordered to be served at some future time during the period of the service of the probation term, then, to quote the Court, the original term, although suspended "informs the judge who revokes probation of what the trial judge thought an appropriate prison term would be."

In that case, which is helpful for our purposes, in that case one judge had imposed the original sentence and suspended it. A second judge revoked the probation and ordered service of the sentence. And the concept voiced by the Court of Appeals in that case was that what was to be done by the second judge, so far as imprisonment was concerned, was already decided by the first judge, indicating again the separation between the two concepts.

Q Mr. Homans, if you put it in terms of more or less lay understanding rather than strictly legal concepts, would it not be fair to say that when one says a person can be sentenced to life imprisonment without possibility of parole, that the reference to without possibility of parole is really a modification or adjective describing the form of sentence?

MR. HOMANS: Perhaps to a lay person, not understanding the difference in concepts, the without possibility of parole, Your Honor, would normally, as I understand it, it resulted from authority of a statute, such

as in this case 7237(d) for the court to make that order. And, again may it please the Court, similarly to the power of the federal court given by 4208(a) to use statutory authority either to order that parole be granted as the case in 4208(a) at an earlier time or as in the case Your Honor poses to say again under statutory authority that no parole shall ever be given. Again may it please the Court, the judiciary or the particular judges involved in that decision. But the decision, I would suggest, is not part of the sentence for the purposes we're dealing with sentence here, may it please the Court.

I agree, Your Honor, and there is perhaps a logical inconsistency between the case Your Honor poses and the position we take here, which is also present, as I say, in the case of 4208(a). But we would suggest that on the basis of the language of this Court in the Berman case, in the Roberts case, in the many other cases which have dealt with the differences between either probation or parole, on the one hand, and the power of the Court to sentence to a term of years and to fine or a fine on the other, that so far as the word "prosecution" is concerned in Section 1103(a), the specific saving statute, that the prosecution has ended, may it please the Court, with the imposition of sentence, regardless of what takes place afterwards in terms either of the exercise of probation or suspension of sentence

discretion or even labor the grant or refusal of parole by a parole board.

I apologize for a rather long-winded answer.

Q Do you recognize the difference that probation is judicial and parole is executive?

MR. HOMANS: At least in the federal jurisdiction, Your Honor, and certainly in all jurisdictions it is an administrative decision, although in some state jurisdictions the--

Q This is federal.

MR. HOMANS: Yes, Your Honor. Certainly here--

Q Parole is strictly executive.

MR. HOMANS: Strictly executive, yes, Your Honor.

Q And do you also say that probation is strictly judicial?

MR. HOMANS: A judicial exercise of discretion, yes, Your Honor.

Q Why is that not part of the sentence?

MR. HOMANS: The reason, may it please, it is not part of the sentence is because judge has already at the time that he makes the decision conceptually, at the time he makes the decision to suspend sentence and to grant probation, has made the decision that this man shall serve two or three or four years, and the man is liable to serve that time whether he is given probation or a suspended

sentence or not. He is liable--

Q Which means it is a sentence.

MR. HOMANS: It means it is a sentence--

Q And the probation is a part of his sentence.

MR. HOMANS: I would not say so, Your Honor, for the purposes of the statute here which--

Q Suppose the judge gives him five years in another type of case, not a dove case, and within the statutory period because the man says I made a mistake, I am going to cut it to three. That's a sentence. The second one is a sentence, is it not?

MR. HOMANS: The second one is reduction, as I understand it, under Rule 35, which is quite different.

Q Is it a sentence?

MR. HOMANS: Yes, sir, that goes into the sentencing process, the reduction of sentence.

Q Is not anything the judge does after conviction within the sentencing part?

MR. HOMANS: No, sir.

Q Why not?

MR. HOMANS: It may be part of the "sentencing process," using the words in a rather broad sense. But I would suggest that what is at issue here is the meaning of the word prosecution.

Q You agree that the prosecution includes

sentencing?

MR. HOMANS: It includes--

Q Do you agree on that?

MR. HOMANS: --sentence. Yes, Your Honor.

Q Is that not the end of your case?

MR. HOMANS: I--

Q I thought you said a minute ago the probation was a part of the sentencing.

MR. HOMANS: No, sir. I said, may it please the Court, that it is part of the--using the language rather loosely--normally part of the sentencing process. But, as we have indicated, may it please the Court, by the citation of Affronti and Murray and Ellenbogen, which appear on page 14 of the brief, the sentence may take place and be followed after an interval of time under Section 3651, which is the probation statute, may be followed after an interval of time, even though sentence was not originally suspended and probation not originally granted. Sentence may be followed after a ten-day or a month or whatever interval of time before execution occurs. And certainly from that point of view, may it please the Court, the sentence has taken place at the time that the man is told, "You are sentenced to five years in jail," period, without any further words of the court as to whether the sentence is suspended or probation given.

Then to give the obverse of the hypothesis Your

Honor posed, if the judge after, for example, a month prior to the time that the sentence is executed thinks to himself, "Well, perhaps this sentence should have been suspended," at the end of that 30 days, providing execution of the sentence is not started, he has the power and the authority to exercise his discretion to suspend and grant probation for a period of years.

Q Assume that this record showed that at the time of sentencing there had been arguments urging probation, with all the usual reasons that may be advanced. And the judge said, "I have"--and this is all on the record and in the record when the case comes on review--"I have considered the arguments and the reasons advanced for probation, and I conclude that this is not a proper case for granting probation because of the past history of this defendant." Where would you be then?

MR. HOMANS: If that had taken place, may it please the Court, I think it is unlikely that we would be here, although--

Q Now, all of those events have preceded the sentence, have they not?

MR. HOMANS: Yes, Your Honor.

Q Enlighten me on how that then is not part of the sentencing process.

MR. HOMANS: As I say, Mr. Chief Justice, using

the words "sentencing process" as imposing all of the matters which the trial judge is considering either at the time he imposes the sentence of years or during that time, including an interval following that, that is part of the sentencing process. But, as the word is used, the sentence is the judgment in the Berman case which we cite.

The prosecution, may it please the Court, has terminated with the judgment of the Court imposing a sentence of years. And what takes place after that so far as probation, suspended sentence, or parole, we would suggest is not part of the "prosecution."

Q But in my hypothesis the events have taken place before the sentence and the judgment.

MR. HOMANS: The attorneys have made the arguments, may it please the Court, and obviously the judge has considered them. But from the point of view of the statute, as it has been interpreted, this is the difficulty--if I can interrupt myself for a moment--with this--not the difficulty, because many cases turn on statutory language. But we suggest very strongly that whatever may be the practical effect and whatever different ways judges and lawyers may deal with the questions involved here, that from the point of view of the way the statutes read, and particularly the wording of the statute insofar as one statute refers to prosecution and another statute refers to penalty, forfeiture, or liability,

that this is a question of, in this case, as to how these statutes are to be interpreted.

I would ask the Court--thank you, Your Honor.

Q You may finish.

MR. HOMANS: Oh, I would ask the Court to consider the arguments in the brief with respect to the applicability of 1 United States Code, Section 109. I have not made that argument this morning but thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lacovara.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I must confess to being somewhat perplexed by the arguments that have been advanced, including some of the arguments that have been made in lower court decisions on the question that is before the Court this morning. As the Government sees the case, it does not involve for the Court's decision the question, What is the nature of the probation decision or the probation process? It does not involve the question of the exercise of executive discretion to grant parole.

What the Court has before it, in our view, is a relatively straightforward question of legislative intent.

This is a case involving two saving statutes, and the question is not, What is the nature of probation? or What is the nature of parole?, but rather when Congress has said that by reason of engaging in certain illegal conduct a person is absolutely ineligible for probation and cannot even be considered for parole, that legislative direction is part of the punishment for engaging in that prohibited conduct. If the answer to that question is yes, if that absolute legislative bar to the exercise of judicial discretion or executive clemency is considered a penalty or punishment, then we submit that the answer to the ultimate question before the Court this morning is clear, that the saving statute, both the saving statute in Title 1 and the specific clause that Congress included in the 1970 act operate to preserve these bans on probation and parole.

Therefore, I will not--

Q Does this case involve parole?

MR. LACOVARA: One of the issues that could be raised, Mr. Chief Justice, is whether the parole question is right. The four petitioners in this case have just been sentenced. They are still on bail, I understand. And although the probation decision or the inability to qualify for probation is clearly raised, there is a question about the rightness of the parole decision.

The Government acquiesced in the petition for

certiorari primarily because of the importance of the parole decision. And I would submit that the issue is a live one, because the way the system actually operates, the Board of Parole is now considering as eligible for parole only defendants who have been sentenced in the Seventh and the Ninth Circuits for narcotics offenses because the courts of appeals in the Seventh and Ninth Circuits have held that people sentenced after May 1, 1971 are to be considered eligible. Since the Court of Appeals for the First Circuit as well as other circuit courts have held that parole eligibility is not eliminated, the Parole Board will not be considering any people sentenced in those circuits for parole.

The petitioners filed a motion before the First Circuit to remand their case to the district judge for him to exercise probation discretion and also to certify whether they should be eligible for parole. If the district judge has the power to determine that they are eligible for parole, the Parole Board--and certifies that on his judgment--the Parole Board will respect that judgment.

Q Is there any way of knowing that the district judge did not consider and reject probation? Do we know one way or the other?

MR. LACOVARA: The sentencing hearing is not before the Court. That transcript is not available. We have

suggested in our brief that there is a real possibility that the petitioners in this case may have been given probation if Judge Wyzanski had the power to do that, and we point simply to the fact that he did sentence them to the minimum sentence that was mandatory under the pre-1970 law, and also three of the petitioners violated the Gun Control Act and Judge Wyzanski placed the three petitioners who were convicted on those offenses on probation. And, therefore, we have suggested that since the record is not clear that he has made a conscious decision on probation, if Judge Wyzanski has the power that petitioners press for, then we think that the remedy that they sought in the Court of Appeals, remand for the purpose of allowing him to consider probation or parole, would be an appropriate remedy.

The question as we see it is basically whether the ineligibility for probation and parole, which was unquestionably contained in the Internal Revenue Code, Section 7237(d), until its repeal in May of 1971, constituted a part of the penalty for engaging in sales of narcotics, the offense of which these petitioners have been convicted.

The interpretation of the savings clauses that are before the Court will be the ultimate question. But we think in order to apply the language of the saving clause it is important to begin by determining what is the nature of the no-probation, no-parole decision that Congress has made

for narcotics traffickers.

In our brief we have set out in some detail the legislative history surrounding the introduction of the no-parole, no-probation directive in the statute, and we think that it underscores quite vividly that Congress was adding an additional penalty in the sense that Mr. Justice Rehnquist before said a life sentence without parole is a modified penalty that is more severe than a simple life sentence.

This, we submit, is exactly what Congress has shown it was doing when it added the no-probation, no-parole provisions and applied them to specific kinds of illegal conduct violative of the narcotics laws.

The no-probation and no-suspension-of-sentence provisions first came into the narcotics laws in the 1951 Boggs Act, which then applied only to smuggling of heroin into the United States and the ban on judicial grant of probation or the suspension of sentence applied in 1951 only to second or subsequent offenders.

In 1956, however, in the Narcotics Control Act of that year, which is generally recognized to have been a very severe and harsh statute, Congress after hearing a considerable amount of testimony about the narcotics statute, tightened the screws. And what Congress did was to apply the no-probation provision not only to second offenders involved in narcotics smuggling, but applied the ban on probation even

to first offenders and applied that prohibition not just to smugglers but to anyone who dispensed narcotics in violation of federal law.

In addition, in 1956, Congress added the ban on parole, making an offender convicted of these narcotics violations absolutely ineligible for parole. Congress denied district judges the discretion to place people on probation and it denied the parole board the discretion to release them before the expiration of their sentence.

We have quoted some of the relevant excerpts from the legislative history surrounding the 1956 legislation at pages 12 through 14 of our brief. And the very language that was used by the witnesses and by the Congressional committees recommending this legislation shows that Congress intended these prohibitions to be an inherent and intrinsic part of the penalty for engaging in narcotics trafficking. Thus, not only is there a mandatory minimum sentence of five years for trafficking in narcotics, which all courts of appeals and petitioners agree has been saved by the saving statute for pre-repeal violations, even if they are not sentenced until after the repeal of the 1956 act. But the no-probation, no-parole directive by Congress was similarly intended to be part of the penalty that was to attach automatically upon conviction of these offenses, just as the mandatory minimum sentence.

In 1970, when Congress passed the comprehensive drug abuse and control act and repealed the various scattered provisions of the narcotics laws, it eliminated the absolute ineligibility for probation or parole that existed under the 1956 legislation. But it so in a somewhat qualified way and for reasons which are important in answering the question before the Court.

The decision to eliminate the absolute ineligibility for probation and parole that was contained in Section 7237(d) was not, we submit, an exercise of legislative clemency; it was not an effort to get soft on the narcotics problem. What Congress was doing in reorganizing the entire drug control structure was to make a somewhat more refined classification.

Even under the 1970 legislation, Congress has provided a category of narcotics offenders who will not be eligible for probation and who will not be eligible for parole. In fact, over the opposition of certain witnesses, Congress even expanded that absolute prohibition. As I mentioned, the 1956 statutes had applied only to trafficking in narcotics. Section 848 now of Title 21, which punishes engaging in a continuing criminal enterprise in the drug field, applies to engaging in any kind of drug traffic, including trafficking in LSD, amphetamines, and barbiturates.

In that statute, Congress has raised the mandatory minimum penalty from five years to ten years, has increased

the outer limit from 20 years, as under the statute which petitioners violated, to life imprisonment, added an additional special parole term, increased the fine to be imposed, and provided for forfeiture.

The reason I am going into these statutes, which conceivably are not directly applicable to petitioners because they didn't become effective until two months after they committed their violations, is that it shows what Congress was trying to do in 1970. It was not trying to do what petitioners' argument would have the effect of doing, and that is to wipe out, to remit in part, some of the very severe penalties that attach to people who violated the pre-1970 laws.

What Congress was doing was redirecting its focus and refining the categories of people who would be punished in this severe way.

Q Mr. Lacovara, just as a matter of curiosity, I know often legislation is made effective in the future, but why so long here, some seven months, I think it was, almost?

MR. LACOVARA: As I mentioned, Mr. Justice, this was a reform, a revision, of the entire narcotics structure. It affected statutes that were scattered throughout the United States Code, and it also provided for extensive administrative changes. Enforcement responsibilities were

being transferred, a whole new administrative system of classifying different dangerous drugs into various schedules was being set up. So, Congress provided that long lead time of six months in order to make sure that all of the actors in the system would have an adequate amount of time to familiarize themselves with the changes that were being made and to bring the operational machinery into line so that it would be effective--effective in a practical as well as a legal sense--on May 1, 1971.

Q For this kind of statute, it is rather hard on the individual concerned when May 1 comes down and forms the barriers--

MR. LACOVARA: Well, no, I think that turns it around. Up until May 1, 1971, the provisions of the old law were in force. Those were the provisions that the petitioners violated, and it is unquestioned that those provisions were the ones--and we contend still are the ones--that provided a minimum sentence of five years in jail and forbade the suspension of sentence or the grant of probation for consideration of parole.

So, we are not talking about retroactively applying the--

Q Precisely, that is my point, that Congress has made its determination in October, made it effective next May, and this individual and others are caught in that interim

period. But that is neither here nor there.

MR. LACOVARA: I think it is either here or there, because that is the dilemma that the lower courts have been wrestling with. There is clearly an anomaly, at the very least, in having to draw a line in saying that someone who committed a violation two months before the effective date is not going to be allowed consideration for probation, is not going to be eligible for parole, but somebody who commits his violation after May 1st will be eligible for these considerations, unless he is engaged in a continuing criminal enterprise.

But this is really an example of Congress having to draw a line somewhere. It could have drawn a line at an earlier stage. But we submit the legislative history shows it did not.

Q The Ninth Circuit's view does not avoid the necessity of line drawing, does it?

MR. LACOVARA: No, sir. As we underscore in our brief, there is just as much challenge to the lines they have drawn. In a parole board case, the Noriega case, which we have cited on page 31 of our brief, footnote 18, the Ninth Circuit has--excuse me, Noriega is page 23 and 24. The Ninth Circuit has drawn the line at the date of sentencing, irrespective of the date the violation took place. The Ninth Circuit says if you are sentenced after May 1, 1971,

you are eligible for probation or parole. But if, as might have happened in this case, the petitioners were tried more promptly and were sentenced immediately, the Ninth Circuit would say, even though the new law has come into effect, nevertheless these petitioners are not eligible for probation or for parole.

What we say is that the Ninth Circuit has substituted its judgment on where the line should have been drawn and might have been drawn for what we think is the legislative judgment. And choosing among options that are otherwise reasonable is emphatically a legislative judgment. But in this kind of setting we think it is a particularly reasonable judgment. The policy underlying the ex post facto clause, for example, is one that makes the consequences of conduct turn not on the time the conduct is adjudicated or sentenced but on the time the conduct was permitted, and this we say is exactly what Congress has done.

If you committed your violation under the old law, the old law applies. If you committed a violation under the new law, the new statute applies.

The saving statutes are reflective of that national policy. The basic saving statute in Title 1 dates from 1871, and it provides what we think is fundamental national policy on the interpretation of the effectiveness of statutes. It provides in very broad terms that the repeal of any

statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute. So, here we come back to the date upon which the penalty was incurred, which would be the date of the violation, unless the repealing act expressly so provides. Clearly, the 1970 act has not expressly provided for the extinguishment of what we think is part of the penalty for these violations. But, on the contrary, the statute is to be treated as still remaining in force for preserving a proper civil action or prosecution to enforce that penalty.

There has been a considerable amount of discussion in the brief about what those words "penalty, liability or forfeiture" mean. In the first case that this Court had to consider that question, the Reisinger case in 1888, the Court applied the statute to a criminal case which--by the way, the statute there had been repealed before the indictment was returned, and the repealing statute itself, just as in our case, had its own saving clause, which was much narrower than the general saving clause. It applied only by terms to saving prosecutions that had already been commenced at the time of the repealer.

This Court nevertheless said that the general saving statute applies in addition, that that narrower focus in the specific saving clause is not to be construed as an express provision to the contrary, and that the words

"penalty, forfeiture or liability"--and this is quoted on page 26 of our brief--were intended by Congress to be synonymous with the term "punishment, and were used by Congress to include all forms of punishment for crime.

That is why we submit today the general saving statute, 1 United States Code 109, operates to save the applicability of the no-probation, no-parole provisions of Section 7237(d). These, we believe and we argue this in our brief, were part of the penalty that Congress created for these violations and as part of the penalty or the punishment, they are saved by the general saving statute.

The specific saving clause also points in the same direction, as in Reisinger and the Great Northern Railway case, which also involved a more limited specific saving clause, which this Court said did not cut back on the general saving clause and allowed a subsequently returned criminal indictment to be prosecuted.

The specific saving clause here reiterates the same national policy; although the language is difference, we think the thrust is the same. And Congress in the specific saving clause says that prosecutions for any violation of law occurring prior to the date--Mr. Justice Blackmun, here again is the question of focus on the date of the violation, although that is not the only focus the Congress might have provided for. But these prosecutions shall not be

effected by the repeals or abated by reason thereof. It does not take much extravagant argument to show that the punishment for an offense is part of the prosecution for it. Prosecution is not just an academic exercise. And certainly, as I believe petitioners have conceded and the lower courts have certainly held, the sentence prescribed for a violation is part of the prosecution for that violation within the meaning of this kind of saving clause.

And if our interpretation of the legislative history is correct, the no-probation, no-parole provisions are part of the penalty that operate automatically, attach automatically upon conviction, then those prohibitions are part of the sentence or part of the prosecution for the offenses that took place and are preserved.

I think one illustration of the point that I am trying to make, that the ban on probation and parole is part of the penalty, part of the punishment that Congress has fixed for violation of a statute, is that the courts of appeals are now virtually unanimous in holding that a guilty plea entered to one of these narcotics offenses is involuntary because without sufficient knowledge, unless the defendant who pleaded guilty not only knew about the minimum sentence, the mandatory minimum sentence, but also knew that upon conviction he would be ineligible for probation and would be ineligible for parole. And the rationale that the

courts of appeal have followed in reaching that result is that, unlike certain other collateral consequences of criminal convictions, the ineligibility for probation and parole are attached to the very violation itself in the same sense that the prison sentence is a consequence of a plea.

For all these reasons, we submit that the Court of Appeals for the First Circuit has reached the proper result in holding that violations of the pre-May 1, 1971 drug laws are to be punished as if those laws are still in effect and for all legal purposes under the saving statutes they are to be considered in force.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lacovara. Thank you, Mr. Homans. The case is submitted.

[Whereupon, at 10:57 o'clock a.m. the case was submitted.]

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