In the

Supreme Court of the United States

PAUL D. McGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

vs.

No. 71-718

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

Washington, D. C.
December 11, 1972

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Washington, D. C.
Monday, December 11, 1972

The above-entitled matter came on for argument at 11:09 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:

MICHAEL COLODNER, ESQ., Assistant Attorney General of the State of New York, 80 Centre Street, New York, New York 10013; for the Appellants.

G. JEFFERY SORGE, ESQ., 262 Old Country Road, Mineola, New York; for the Appellees.

C O N T E N T S

* * *

Afternoon Session begins on page 42.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-718, McGinnis against Royster.

Mr. Colodner.

ORAL ARGUMENT OF MICHAEL COLODNER, ESQ.,

ON BEHALF OF THE APPELLANTS

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

The issue in this case is, What is the role of federal courts in examining state statutes which relate to the internal in-prison administration and what is the scope of this role within the Equal Protection Clause.

The appellees in this case are inmates of state prisons. Each of them was arrested and spent time in the county jail prior to trial because they could not post bail. The appellee Mr. Royster had been indicted for burglary and had spent 11 months in jail in 1965 and 1966. Mr. Rutherford had been indicted and convicted of robbery in the first degree. He had spent eight months in jail in 1966.

Under provision Section 230, subdivision (3) of the Correction Law, he received no credit for good behavior for this period of pre-trial incarceration. He did receive credit for the amount of time on his full sentence that he spent there, but he was not allowed to earn good behavior time.

Q How does a state institution go about evaluating the good behavior of a man who is not in their custody?

MR. COLODNER: There is no way for the state to evaluate the good behavior of a man who is not in their custody.

Q But you want credit for it even though they have no way of evaluating it; is that not the essence of this case?

MR. COLODNER: The essence of this case is that plaintiffs say that they wish to be credited for this time, and the state contends--

Q Would this be an irrebuttable presumption that during the 11-month period his behavior was good as defined by the state institution?

MR. COLODNER: If we were to accept the reasoning of the district court judge, we would have to have an irrebuttable presumption to that fact. There is no way--

Q Even though his behavior might have been such as in the state institution, it would be rated as very bad. You concede that, I take it, that might be the consequence.

MR. COLODNER: That is true. But the real problem that this case presents is that the concept of good behavior in a county jail over and apart from the supervisory problem

and the evaulation problem, is totally different from the concept of good behavior in a state prison after someone has already been convicted and is now part of a rehabilitation program as in fact amenable to rehabilitation. If someone in the county jail when he is arrested is presumed innocent, there seems to be no need--certainly there is no need for the state or the county or any political entity to institute a rehabilitation program for someone who is presumed innocent and is presumed to have no need for rehabilitation at all. It is only after he has been convicted that not only does the state presume the need but the individual inmate now is in the proper attitude to presume that he can be reformed and rehabilitated.

Q Is there any classification process at the detention level as at the state level when they get into the penitentiary? Do they undertake to classify people within categories of either skills or psychological--

MR. COLODNER: Your Honor, there is an orientation program when someone reaches the state penitentiary; he goes to a receiving center--

Q No, in the jail I am speaking of.

MR. COLODNER: There is nothing in the county jails at all. You are detained. You cannot make bail. You are put in a cell. And if by some fortuitous circumstances the local institution has some type of recreation available or

some type of small something or other, the inmate is lucky enough to be able to partake in that while he is waiting there for his trial.

Q That is true of every county and municipality in New York?

MR. COLODNER: Some counties have absolutely nothing. Some have a little something. It depends on--

Q If there is something, it is only for recreational purposes?

MR. COLODNER: Very often it is nothing more. But we have this problem. There are inmates in county jails who are serving misdemeanor sentences. County jail very often outside of New York City serves a dual function. It detains people waiting for trial and also detains people who have been convicted and are serving sentences of one year or less.

Q Are there some counties in New York or some places where they have as a detention center something less than a jail more in the nature of dormitories; or is that some other state I am--

MR. COLODNER: I am not aware that--we do have a system now where we only have sentence served on weekends--sentences served on weekends--but I don't think--you are really talking about a minimum security type of institution, and with pre-trial detainees I don't think that we have

anything like that. This is a post-conviction after an evaluation is made by the state correctional people.

Q Mr. Colodner, going through the mathematics of this argument, I take it that what it comes down to, the difference between you and your opposition, is one-third of the jail time. I think mathematically this is where the algebra comes out. That's all you are arguing about.

MR. COLODNER: Well, we are arguing about at most two or three months.

Q Well, it is one-third of the jail time. I am sure algebraically this is what it comes out.

MR. COLODNER: About one-third of the jail time.

Q Let me ask you--not only about, I think it is one-third of the jail time.

MR. COLODNER: Okay.

Q Is there a possibility of mootness here?

MR. COLODNER: There is no possibility of mootness at all. There are--

Q Rutherford has already had his date come and go, has he not?

MR. COLODNER: No, Royster has has had his date come and go. Rutherford has his date set for January 23, 1973, but this is a class action, Your Honor. It affects the entire class of prisoners who have been imprisoned prior to the--prior to 1967 or who have been arrested prior to 1967.

Q Well, is this true as to all named members of the class?

MR. COLODNER: Yes. Well, the two named members of the class are also pre-1967 prisoners.

Q But do they not have their date; one of them already has passed and the other one is coming up in a month?

MR. COLODNER: That is true.

Q Certainly probably before this Court can decide the case.

MR. COLODNER: That is true, but we have the situation, as this Court faced in Dunn v. Blumstein, we have a statute, the enforcement of which is capable of repetition yet escaping review. We do have a substantial number--we have over--we have 2,322 old-law prisoners remaining in state prison, all of who are affected by the former correction law. Of this group, I would say at least two to three hundred are affected by this very provision, because anyone who is arrested or has committed a crime, say, subsequent between 1963 and 1968, say, and it was a serious crime, it was a murder or a robbery in the first degree, or they were a multiple offender, every single one of these people would be affected by this law and would not have reached their minimum date at all.

Q I take it that you on behalf of the state

are not raising the question of mootness.

MR. COLODNER: We cannot raise the question of mootness because we have a class order action against us, and if this case were to be moot we would have our statute declared unconstitutional.

Q Yes, but is that the answer to it if all your named parties are out?

MR. COLODNER: Then our basic problem would be as soon as the named parties are out, another named party would come right in. I myself have a case pending in the district court awaiting the disposition of this case, involving someone who comes right under this statute.

Q Would this second named party now be released were he to prevail in this case, the one who has the January 23 date?

MR. COLODNER: Not necessarily be released. That just means that he would meet his parole board at that particular point.

The basic problem that really happened with this case is that the district court misunderstood the concept of--

Q Excuse me. Then this gentleman's date is only when he may be considered for parole.

MR. COLODNER: Only when he may be considered for parole.

Q And if he were not paroled, he would have to

wait until when?

MR. COLODNER: He would have to wait until the maximum of his sentence or depending on how much good time he would earn on that sentence.

Q Is that the only consequence of good time under the New York Penal Code, Mr. Colodner, is it determines the initial date on which you first go before the parole board?

MR. COLODNER: That is the only consequence of good time on the minimum sentence, which is the only thing at issue in this case. There is good time on the maximum sentence, and here we have a very interesting distinction and this is where the district court really missed the conception. Good time on the maximum basically serves more of a custodial function. Here is really where you are trying to encourage good behavior. It is essentially a negative concept. Do not break the rules and we will reward you with a certain amount of good time. That is on the maximum.

Good time on the minimum does not serve that function. It is more of a rehabilitative function. It is saying, "You perform well. You show a positive attitude, and we will give you a chance to be released very, very early." And it is the balance of these two concepts which is really at issue here, and we are dealing with the minimum sentence, and this

is the rehabilitative concept.

Now, as I pointed out in my brief, historically there has always been a distinction between what was called commutation for good conduct and compensation which was for positive performance. And the whole history of the New York correctional scheme tries to strike a balance between the two until finally in 1931 the two are consolidated. In fact, at one point they used to actually pay people for compensation, and then they finally reduced sentence for compensation.

Now specifically in the statute there is a reduction in sentence for both good conduct and for the efficient and willing performance of duties assigned. So, good time is certainly more than a question of whether you are bad or good as the district has stated. It is not a question really of saying whether being bad or good is a primary function and rehabilitation is a secondary function. They are equal functions under the statutory scheme.

Q To what extent is rehabilitation actually in existence in New York?

MR. COLODNER: Well, rehabilitation is in existence to this extent--

Q It is something we are working toward, is it not?

MR. COLODNER: Definitely, Your Honor.

Q Why should a man's release be dependent on

something that is just ephemeral?

MR. COLODNER: Your Honor, we do not know to what extent rehabilitation is really the full role of the prison or the role of society. We have set up a system to enable the state correctional authorities to evaluate an individual's particular performance in a particular program.

Q Who evaluates it?

MR. COLODNER: There are two means of evaluation. First, there is the Department of Correction, which evaluates him under very, very strict standards.

Q And how many people does he come in contact with who evaluate him?

MR. COLODNER: Well, first of all there is a time allowance--

Q Is it not true that you have one or two in a jail with a thousand men?

MR. COLODNER: That is not true. That is not true.

Q How many do you have?

MR. COLODNER: For evaluation?

Q For rehabilitation.

MR. COLODNER: For rehabilitation you have--

Q And then evaluation after the rehabilitation.

MR. COLODNER: Rehabilitation is a continuing concept. You have your industry set up, you have work training. You have a school program set up, you have an

educational curriculum.

Q What industry do you have other than stamping out license plates?

MR. COLODNER: A great many industries, Your Honor.

Q Like what?

MR. COLODNER: Textile factories. We have barber shops. We teach trades. We manufacture a lot of goods. I know Greenhaven State Prison has a textile factory. I am not familiar with anything more than that.

Q How much do you have in Attica?

MR. COLODNER: I am not familiar with the situation in Attica, Your Honor.

Q Well, you are talking about the whole state.

MR. COLODNER: That is true. But the fact--Your Honor, the fact that rehabilitation may not be successful and the New York State Department of Correction is not going to stand before this Court and say that we are successfully rehabilitating every prisoner who comes there does not mean that the state cannot try to set forth a statutory scheme and attempt to rehabilitate, and if the scheme is not successful, to try a new scheme.

Q If I understand this man's complaint, it is not about rehabilitation or what have you; it is about using a standard by which he loses a third of his time. That is all he is complaining about.

MR. COLODNER: That is correct, Your Honor.

Q And your answer is that he is losing because you have this very elaborate rehabilitation program; am I right or wrong?

MR. COLODNER: He is losing this because we have a very--not an elaborate--but we have a system of evaluation of a prisoner's performance in a state correctional program, and this is very important--

Q Did I hear you say that there were no rehabilitation programs?

MR. COLODNER: If there were no rehabilitation program at all, I think it would still be the same; it would be the same for other reasons. Because you have a man--you are releasing him not only at the minimum date but sometimes they set a date all the way at the lowest possible date this man can get out. And the correctional scheme set up under this law is that they are going to let him out two-thirds of that date, which means even lower than the lowest. They have to evaluate the man, and it is perfectly reasonable for the state to set up a system that says, "We are not going to consider time spent in an institution when we have no chance of evaluating him." Maybe this is not the perfect system, but Equal Protection does not require that we have the perfect system. And one of the basic problems with the opinion of the court below is that it said, "Now, wait a

second state. I do not think you are putting in the best system." And so the district court, the majority below said, "Let me show you how to do it," and he showed how we can basically have a better evaluation by the parole board in the state prisons, how we could transfer the records from the county jails, and we can set up the system that way. That might be true, but the Constitution does not require that the state do this. There is nothing unreasonable about the statutory scheme which is set up right now.

State prisons and county jails are completely different. County jails, for the first part, offer nothing. They are purely detention centers. There is certainly not a fact in this record to show that they offer anything; and it would be impossible for the state to set up a system of evaluation or rehabilitative program in an institution where people are presumed innocent and could not be subject to it. In fact, if they were compelled to participate, we would have a Thirteenth Amendment problem. And also where the sentences, where the amount of time spent in the county jail is so short comparatively that if you were going to set up any sort of a meaningful program or even have any meaningful evaluation, it would not be worthwhile to look upon two or three months in an institution when nothing can really be accomplished within that space.

Now, it must be remembered that the evaluation by

the Correction Department is dual evaluation here. First, the Correction Department certifies to the Parole Board that this man is now ready to be considered for release, and this is certainly something the Legislature can do. The opinion of the court below argued strongly that the Parole Board has a lot of discretion and so it does not really matter. But a state legislature certainly has the power and the right to draw a line and say, "Up to a certain point, Parole Board, you are not allowed to make this evaluation, because we have made a legislative determination that a man has to spend a particular amount of time in a particular program."

And this evaluation--and I left out Section 214 of subdivision (4) of the correction law--is a very serious one because it involves a complete redetermination of the inmate's attitude, of his progress, and this is made by officials, the director of prison industries, the physician, the warden, the director of education. This is a serious evaluation and it cannot be done by considering time in a county jail.

What essentially happened here was that the district court ignored everything. In fact, the district court acknowledged that oh, there certainly are differences and, yes, there are different goals and, yes, you really cannot rehabilitate people in county jails. But it means that the primary basis for this statute was whether someone was good

or bad, and that is it. And this totally ignored the differences that I have stated, that the primary basis for the release on good time on the minimum sentence is a rehabilitative function, not a custodial function.

And then the district court said, "Well, assuming that there are"--

Q As I read the opinion, the opinion was this is not to serve a rehabilitative function at all but the overriding consideration is the granting of good time reductions, maintenance of prison discipline.

MR. COLODNER: I do not know where the district court gets that reasoning from because--

Q Where do you get your reasoning from?

MR. COLODNER: From the very language of Section 233 of the correction law. Good time is awarded for good conduct and for the willing and efficient performance of duties assigned. It is two concepts and they balance.

Q But is it important for you to decide which one is the primary as long as the district court did not deny that the other reason was part of it?

MR. COLODNER: Absolutely not. In fact, the district court acknolwedged it and said if it was the sole and exclusive reason, "State, I would agree with you." But the district court decided, from my reading of the opinion, that since it was not the sole and exclusive reason, we only

go by what the primary reason is, and this is totally in conflict with the decisions on this Court in Equal Protection.

Q This is what the court said: Defendants contend that good time is granted as an incentive to the inmate--the defendants being you--to participate in these prison rehabilitation programs. Since county jails are not equipped to provide such services, there is no basis for granting good time severing. If it were clear that the awarding of good time was based solely and exclusively on an evaluation of an inmate's performance in such programs, so endemic to the state prison system, the denial of good time for jail time might be understandable. However, this does not appear to be the case. Rather, it seems that the overriding consideration--now, the three-judge court said the overriding consideration in the granting of good time reductions is the maintenance of prison discipline. And you quarrel with that?

MR. COLODNER: I certainly do quarrel with it. First of all--

Q And your answer to it is the statute cannot be read that way?

MR. COLODNER: The statute cannot be read that way. We put in affidavits to the effect that this was not the purpose at all, that there was much more purpose than the

award for custodial behavior.

Q You also say that the statute should be upheld as an effort to serve the non-overriding purpose of the statute?

MR. COLODNER: A statute should be upheld to serve whatever purposes it is passed for. We cannot make considerations as to whether something is primary or secondary. If that were the case, any judge can look and decide to see what--or any court can look and decide to see which one he would like best and then pick it out and then try to gear and restructure the state system according to whether he thought it was the primary basis or the secondary basis. And in fact--

Q You say that is what the rule should be under the Equal Protection Clause?

MR. COLODNER: Definitely.

Q Maybe some other clauses, primary and secondary, have some relevance?

MR. COLODNER: Whatever other clauses there are, I do not know, but certainly not the Equal Protection Clause. For instance, let us assume that good behavior is the primary basis here and that evaluation is a secondary basis. Why could not the legislature then repass the same statute and put a little addendum at the bottom and say, "We think that rehabilitation is the primary basis"? This is exactly what

the Court dealt with in Palmer v. Thompson. And so we do not look to the motive of the legislature. We look to see whether there is any state of facts that can conceivably justify the classification. If we find a state of facts, that is the end of the judicial role.

Q How long have you had time off for good behavior in New York?

MR. COLODNER: Pardon? Excuse me?

Q How long has New York given time off for good behavior?

MR. COLODNER: Under this particular scheme--

Q How long has New York--

MR. COLODNER: Since the turn of the century, Your Honor.

Q And how long have you had a rehabilitation program in New York?

MR. COLODNER: We have had a developing program since the turn of the century.

Q You really say that?

MR. COLODNER: Yes. In this particular field of prison administration, the standard which has to be used is the rational basis standard, because we are dealing with what is a very sensitive area. We have to balance both the needs of the prison insofar as the needs of the inmates are concerned and the needs of the prison structure are concerned

versus the needs of society, which is paramount to whether someone is going to be released prior to the lowest part of his sentence.

There are no known solutions to this problem. And, as Mr. Justice Marshall points out, there may be problems as to whether rehabilitation succeeds or not. And penology is a very open science. For this is the very area, because of the openness of this field, where the state has to have broad discretion, just like this Court stated in Jefferson against Hackney in the welfare area, which is also a very open question in terms of what is the proper solution. The state cannot be put in a constitutional straitjacket in dealing with how we are going to set up a very complex system of awarding good time.

As is illustrated by the history of this statute, since the turn of the century we have been constantly changing our statute, sometimes putting good time on the minimum, sometimes on the maximum, sometimes on indeterminate term, sometimes on definite terms, trying to strike a balance. And the state should be allowed to do this.

Q Do all the people involved in this case get jail time for their--

MR. COLODNER: Everyone gets jail time.

Q They get credit for the time--

MR. COLODNER: That is right.

Q --they sit in jail.

MR. COLODNER: That is right.

Q They do not just get good time for that jail time?

MR. COLODNER: That is right.

Q Mr. Colodner.

MR. COLODNER: Yes.

Q The opinion of the three-judge court, it is at 61A of the Appendix, states that under certain circumstances the state does grant good time credit for pre-sentence detention.

MR. COLODNER: That is right, Your Honor.

Q Would you explain the circumstances under which that occurs?

MR. COLODNER: Good time is granted on the maximum sentence.

Q Just on the maximum?

MR. COLODNER: No, there are the--on the maximum sentence because, as I pointed out, the difference between a custodial component on the maximum and the rehabilitative component on the minimum makes it a more effective disciplinary device on the maximum. Good time is also awarded for jail time on penitentiary sentences; those are sentences for misdemeanors of less than one year. Here again the evaluation is not that sensitive. We are dealing with

short sentences, with much less serious crimes, and with the very practical problem that the county jails are overcrowded and they want a faster turnover.

Q So the good time for pre-sentence detention is allowed only with respect to the maximum and only where this ultimate sentence is less than a year?

MR. COLODNER: That is right. It is under the old law.

Q Even though the one person who gets the time would be in the same jail as one who does not get the good time?

MR. COLODNER: I do not think that there is a comparable situation there. I do not know whether you can--yes, that is true. If someone--now, if you are comparing someone with both people who are convicted of felonies, there is no comparable situation. Neither of them get good time.

Q That is right. Neither of them.

MR. COLODNER: Neither of them. But if you are someone who is convicted of a misdemeanor as opposed to someone who is, let us say, indicted for both--

Q Yes.

MR. COLODNER: --the misdemeanor would get credit for good time.

Q And they both might be in exactly the same

jail.

MR. COLODNER: Exactly the same jail. But it makes no difference in those terms, because when you are dealing with a misdemeanor, the state legislature has set up a system which is purely custodial; it is a very short sentence. And they are willing to give him as much time as they wish to give him without trying to set up a program for rehabilitation.

Q So, you say in this context the state purpose that you say justifies the discrimination against these petitioners does not exist?

MR. COLODNER: That is right. There is no discrimination against these petitioners in terms of the goals of this particular statutory scheme.

Q There is discrimination; it is just that it is justified, I take it.

MR. COLODNER: Definitely justified.

Q I mean, you say it is justified.

MR. COLODNER: I say so, and I think that the record bears me out. I think that the majority of the district court just did not like the statute, because the majority of the district court basically acted as a super-legislature and showed the state of--

Q That is what Judge Hays said.

MR. COLODNER: I do not know if Judge Hays used that

word. I used that word in my brief.

Q The last sentence reads a lot like that.

MR. COLODNER: I think that is exactly what the district court did. It incorrectly analyzed the statute. It totally ignored every justification we put forth by saying that it would not consider these justifications because they were not solely and exclusively--

Q Basically, I gather, your state's position is that however many purposes this denial may serve, at least it serves one state purpose, that on the rational distinction basis--

MR. COLODNER: That is correct, Your Honor.

Q --it sustains the statute, not being rehabilitation.

MR. COLODNER: I would suggest that it serves more than one but that--

Q That may be but at least that one.

MR. COLODNER: At least that one.

Q And all you have to show is that it serves one.

MR. COLODNER: That is correct.

Q That is your position, is it not?

MR. COLODNER: That is our position. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Colodner.

Mr. Sorge? Before you start, let me put this

question to you, and you may develop the point as you wish. Suppose that there was a pre-trial detention of a man in a jail in France subject to extradition to this country and it took six months to get him extradited out of France back to New York for trial under the extradition treaty; would you make the same arguments there that you are making here?

ORAL ARGUMENT OF G. JEFFERY SORGE, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SORGE: Your Honor, I believe it would be very difficult to really answer that question if it refers to a penal institution in France. I doubt very much that the state penal institutions in New York State would be in a position to judge whether a person has behaved properly in a penal institution in France, whether there are any programs. They would really not be able to evaluate any type of program in France. I believe that a better example might be, let us say, if a person was detained in New Jersey and he is extradited from New Jersey.

Q Let us make it Alaska.

MR. SORGE: Okay, Alaska, another state of the nation. Here we have the interstate compact which states that any prisoner in another state prison and subject to the jurisdiction of New York at the same time will be treated equally under the law. So, here we would not have the problem.

Q Do you think it is any easier to evaluate what is going on in a local jail than it is on what is going on in a jail in Hawaii or in Alaska?

MR. SORGE: Yes, I do, Your Honor. I believe it is much easier, just because the location of the jail--I believe also it is indicated that the ultimate jurisdiction of all jails is under the Department of Correction, so there is obviously an intertwined aspect here where--

Q If they are holding the man in Alaska, pre-trial detention, they are acting as an agent of the State of New York, are they not?

MR. SORGE: Yes, they are, Your Honor.

Q Or Paris, France.

MR. SORGE: I agree, Your Honor. And I think this would boil down to the position that really--which is the position we maintain and maintained throughout this entire case--that it does not really matter where they are detained; it just matters, you know, what good time is actually credited for. The Attorney General in his argument alleges that the good time is granted as an incentive for participation in the rehabilitative program. We believe that there are more than sufficient examples in the district court's opinion and in our brief to show that this is not the purpose of a good time reduction.

Q You mean no part of the purpose at all?

MR. SORGE: Yes, Your Honor. This is the--

Q I thought what I read to your brother earlier from the majority opinion at least accepts, I thought, the idea that there was something overriding about maintenance of prison discipline, but that did not preclude the rehabilitation objective that your brother spoke about.

MR. SORGE: I believe that if Mr. Justice would refer to page 59a of the Appendix, here the court considers the differences between the county jail and the state prisons. And I believe it is stated there that whatever the differences are, it does not matter because these are not reasonably related to the purposes of the statute. In other words, the three-judge court is not contesting on any differences between the two jails. They are just stating merely that whatever the differences are, these differences are relevant because these differences are not equated with giving good time. And in that light, Your Honor, I would submit that this Court did not concede that there were differences and did not state that these differences attributed to giving good time.

And I would like to just pose an example. While the--

Q Then it is your position that the only purpose at all, sir, by the statute, exclusively, the only single purpose, is the disciplinary one?

MR. SORGE: Your Honor, it is extremely difficult to say whether the only purpose is just for the discipline. I believe that the court has--

Q If a purpose is the rehabilitation one, then are you not in some trouble?

MR. SORGE: If the main purpose is?

Q If a purpose, not the main purpose, a purpose.

MR. SORGE: I do not believe so, Your Honor, because, as the district court stated, the overriding consideration in this case is disciplinary.

Q I know it did.

MR. SORGE: Now, I believe--

Q Suppose rehabilitation were a subordinate purpose.

MR. SORGE: I believe that just by the examples cited in the district court's opinion and in the examples cited in our brief, there are very many situations where an inmate does not have available any rehabilitative facilities whatsoever, yet he still gets good time credit. And I think in a situation there we can see clearly that the rehabilitative facilities have absolutely nothing to do with granting of good time, because there are absolutely no rehabilitative facilities.

Q You go further then than the district court, I take it, because I read the district court's opinion the

same way Mr. Justice Brennan does, as saying that rehabilitation is a subordinate function and that its opinion is based on that. You say that it really is no function at all?

MR. SORGE: I believe that if you take the state prisons themselves, Mr. Justice, there might be a subordinate position. However, I would repeat that the overriding consideration is the disciplinary aspect of it. However, in other situations which come under the jurisdiction of the state Department of Correction, we can extend this argument even further, saying that the rehabilitative facilities have absolutely no relationship to the granting of good time. So, it would be a twofold argument. At one time I am agreeing with Your Honor. At the same time, I believe that the logical extension of this is that in very many situations it does have no relationship to the statute.

Q I gather you agree that the Equal Protection test here is the rationality test of Dandridge, not the compelling interest test?

MR. SORGE: Yes, I do realize that, Your Honor, and I point out that the district court, in contradiction to the Attorney General's argument, also recognized the various standards imposed by Dandridge. They stated first that the Equal Protection Clause requires only that the state's practice be rationally based and free from invidious discrimination. They also stated that while certain

individuals might be substantially harmed by any form or type of discrimination, that this will be okay if there is a valid governmental objective. However, I believe that the important aspect of this is the court's comment immediately after this, and this is found on page 59a of the Appendix. The court, after citing these two principles and after, I believe, showing clearly to this Court that the lower court was aware of their duty, the court stated that they would not countenance any artificial distinctions not reasonably related to this statute, and I think this is the crux of the problem here. The court has determined that the justifications presented by the Attorney General in this case are not reasonably related to the statute and are purely artificial distinctions.

The Attorney General, Your Honor, has stated that the district court has totally misapplied the Equal Protection standard. And the reason they misapplied it, number one, is that they did not challenge the Attorney General's argument that there is a difference between the facility's purpose and usage of the state jails versus the local penal institutions.

We submit that the state has considered these differences, as we stated before, and they found out that they were not reasonably related to the statute. The manner in which they arrived at this conclusion is by looking at the

legislative intention. And the manner in which they did this was with several. In the first case, the fact that good time is a disciplinary device in the state penal institution was readily conceded by the Attorney General.

Also we find that in New York State court--this is in the case of Perez v. Follette, which is cited at page 8 of our brief and on page 60a of the Appendix--this Court, while upholding the constitutionality of the statute, arrived at the same conclusion, that good time is in effect a disciplinary device.

Also we find that while this case refers solely to the provisions of Section 230, subdivision (3), which draws a distinction between the county inmates who are subsequently sent to the state and persons who are not so detained prior to being sentenced.

The courts of New York have also considered the following subsection. This is 330, subdivision (4), and this concerns the maximum release date.

There is a very clear distinction between the two sections as far as the language which is employed. The Court will notice that in subdivision (3) the legislature--

Q Are you relying on Perez v. Follette as a construction of 233 limiting its purpose to the disciplinary objective?

MR. SORGE: No, Your Honor. I submit it to this

Court that that gives an indication of what the state's purpose is as far as that section is concerned. That is the limited purpose that I am citing that case.

Q Except what it says is the policy underlying a discretionary grant of good time reductions is clear; the attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior. But at the same time the fact that reductions can be withheld will inhibit bad conduct. That is the language, is it not?

MR. SORGE: Yes, Your Honor.

Q May I say again, is this an interpretation of the statute?

MR. SORGE: I believe that is an interpretation of the statute, but I think at the same time we can find out--

Q Meaning an interpretation to what effect?

MR. SORGE: I believe this is an interpretation that shows the legislative intent of the statute.

Q That this was the only intent?

MR. SORGE: It is very difficult to say whether this is the only intent, because the case does not, you know, expound upon that factor really. However, there are other considerations that the Court should look at when they look at the legislative intent, not only one case; that was decided by the court. As I was explaining before, the difference between subdivision (3) and subdivision (4) of

the section note on 230 of the New York Correction Law, it draws a clear distinction between in one case the pre-trial detention of prisoners as far as good time on their minimum sentence is concerned and pre-trial detention of prisoners as far as their maximum or conditional release date from a state pentitentiary.

The first subdivision, subdivision (3) specifically states that this good time should be determined on the amount of the minimum sentence, less jail time. Subdivision (4), however, does not refer to jail time whatsoever.

In People v. Deegan and the case of Paul v. The Warden of Suffolk County Jail, which is found in the Appendix at page 60a and also at page 8 of our brief, this very issue of whether jail time should be included or excluded in the computation of good time to be provided in the determination of the maximum sentence was raised. And what was the argument by the state in both of those cases? In both of those cases the state argued that there are differences between the county jail and differences between the state jails. There are differences in purpose, usage, and facility, and in both of those cases the courts rejected the state argument. And I believe that is very important to show the legislative purpose there.

Another example. When a prisoner arrives at a state penal institution after being transferred from the county

jail, when is his good time computed? It is computed immediately upon his arrival. And I believe the statement of the district court is very correct when it states that this indicates that a prisoner does not earn good time credit when he is in state penitentiary. Instead, he is penalized for bad behavior. And how is he penalized? I believe the state legislature makes this quite clear in establishing various boards for disciplining the person and also for determining when good times should be allowed. There are two boards. I refer to one. This is what they call the Superintendent Proceeding. The Superintendent Proceeding is a proceeding that is used whenever there is a disciplinary action taken against a prisoner in a state prison. This action arises whenever there is misbehavior involving a danger to life, health, security or property, or in a case where there is persistent minor violations against the rules of the prison.

This is a very elaborate procedure which starts where a report is filed by one of the sheriffs or one of the guards on the floor. This report is subsequently forwarded to what they call the Adjustment Committee. The Adjustment Committee reviews the report. The Adjustment Committee may take three actions. It may recommend reappraisal of the prisoner's program. It may recommend nullification of the report. Or it may take what they call Adjustment Committee Action. Adjustment Committee Action, very briefly, is an

action where they discuss a problem with the persons who are involved, the inmates and the guards on the floor, et cetera. And after this Adjustment Committee rules on this case, then they take further action. They may confine a person in his cell or they may confine the inmate in a private housing unit or they may take away specific privileges.

Up to this time, you must realize that there is absolutely no provision for taking away good time. Good time is taken away subsequently. They have to go through further proceedings to get to the point where they can actually take away good time.

After the Adjustment Committee has made their ruling, only until there are persistent violations after that could they possibly refer this to a Superintendent's Proceeding. At a Superintendent's Proceeding, if one is had, we have a formal procedure of due process where a person is represented by an employee of the state prison.

Q Are you talking about administrative remedies?

MR. SORGE: Yes, exactly, Your Honor. Not administrative remedies really, Your Honor. This is an administrative procedure for taking away good time. There are only two procedures that we can find for taking away good time. This is one of them. And I am using this example merely to show the disciplinary and the punitive nature of

this, to show that the factor of good time is based upon good behavior.

Q Would there have been any discretion in the administrators to grant good time in this case?

MR. SORGE: I am not exactly sure if I understand your question, Your Honor. As far as--

Q I will put it this way. Does the statute require the discrimination to which you are objecting?

MR. SORGE: Section 230, subdivision (3) does, yes.

Q It just requires it; it is not a matter of an administrative application--

MR. SORGE: Oh, definitely not. The statute states specifically that--

Q The prison administration would have no discretion whatsoever to vary from the statute?

MR. SORGE: No, I believe they would not.

Q Your view of the matter would require, would it not, that the state institution give credit as though the man's behavior had been of the highest order even though that might be contrary to the fact?

MR. SORGE: If it is contrary to the fact, all they have to do is look at the file sent from the county jails which indicate what jail time should be credited to the person and also gives a portfolio of the defendant's actions.

Q Are you suggesting that these files are a

complete substitute for their own observations and their own standards in the state institution?

MR. SORGE: Yes, Your Honor, as far as good behavior is concerned. I do not believe that you have to have a very complicated procedure to determine whether a person has been faithfully abiding by the rules of a specific penal institution. I do not believe that there should be a difference in the location of the detention facility, as far as good behavior is concerned.

Q And you would carry this again in the hypothetical I gave you, if he were in the prison in Hawaii or Alaska?

MR. SORGE: Yes, Your Honor.

Q But you would not undertake to carry it beyond out continental boundaries, I gather?

MR. SORGE: I just believe that it might be a little bit too complex, and I am not prepared to argue that issue. There is a very good possibility that it would apply equally to that jurisdiction also.

I believe also, while we are returning to the Superintendent's Proceeding, here we have one example, administrative action or procedure which is definitely punitive in nature. It is definitely a disciplinary board in nature which takes away good time. In response to this, the Attorney General has stated that there is another board.

This is a Time Allowance Committee. And he states that the Time Allowance Committee considers more than just the behavior of the inmate while in prison in determining whether good time should be allowed or not.

And I would like to state the--specifically I would like to quote from a statute which determines or which directs exactly what the purpose of this committee is. This is found on page 60a of the Appendix and also recognized in the Appellant's Brief on page 6. They state that in regard to this board, whether they should allow good time or not, they say the board shall have discretion of withholding the good time allowance as, and I quote, "a punishment for offenses against the discipline of the prison or penitentiary in accordance with the rules hereinbefore mentioned, reduction credited to a prisoner in the first instance in his account by the warden, as provided in Section 230, shall stand as the reduction allowed unless withheld wholly or partly by the board as punishment as above provided."

I believe this purely shows and clearly shows the legislative intention that the reduction of good time is a punishment for bad behavior in a prison.

There are very many situations where good time is credited to other persons in different situations, such as good time is credited to both misdemeanants and felons serving definite sentences in county jails, and this is very

important, because the language referring to these individuals, which is Section 250 of the Correction Law, states that good performance or good time shall be credited based upon the defendant's behavior, conduct, and his efficient and willing performance of duties in that county penitentiary. It is exactly the same language as contained in Section 230, subdivision (3). And I believe that this would undermine the Attorney General's argument that any difference in usage, purpose, or availability of facilities in the county jail versus the state penal institution is a determinative factor in deciding good time.

And in this regard, I would like to use another example. While we are considering mainly the local county jails as pre-trial detention facilities, there are other pre-trial detention facilities in the State of New York. They do not have the--I believe, Mr. Chief Justice, you asked before whether they had a pre-trial facility which really was not detention, which was a minimum security facility--they do not have any such thing in New York. However, they do have two other facilities for pre-trial detentions. If a person is found to be criminally insane and not competent to assist his attorney in presenting a defense to its case, then he may be certified to various state institutions in the State of New York. These are state institutions for the mentally retarded. They have two such state institutions.

One under the jurisdiction of the Commissioner of Mental Hygiene; the second one is under the jurisdiction of the Commissioner of Correction, the person involved in this case. The Commissioner of Correction has jurisdiction over two such facilities. These are Mattawan State Hospital and Dannemora State Hospital. And while a person--may I just continue this, I will conclude--while a person is there, he is receiving rehabilitative facilities, receiving rehabilitative treatment.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch. You have a substantial amount of time left.

[Whereupon, at 12:00 o'clock noon, a luncheon recess was taken.]

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AFTERNOON SESSION - 1:00 o'clock

MR. CHIEF JUSTICE BURGER: You have some time left, Mr. Sorge.

ORAL ARGUMENT OF G. JEFFERY SORGE, ESQ.,

ON BEHALF OF THE APPELLEES, RESUMING

MR. SORGE: Thank you Mr. Chief Justice, and may it please the Court:

Immediately prior to the luncheon recess of this Court, I was describing how the county jails are not the only pre-trial detention facilities in the State of New York. There are other detention facilities, one of which are the state hospitals for the persons who are mentally incapable of standing trial. These state hospitals are under the jurisdiction of the State Department of Correction.

Q But you would not apply good behavior standards to people confined in those circumstances ordinarily would you?

MR. SORGE: Your Honor, not only are these pre-trial detention facilities, however, they are also facilities which receive inmates who are transferred from the state prison to the mental institutions. And for the period of time that these mental patients stay in these institutions, the State Commissioner of Correction does grant them good time. So, I believe that they--

Q Is that a reasonable thing to do? You would

hardly take a person who is confined because he is mentally incompetent and hold him to the standards that you would hold normal people.

MR. SORGE: Yes, Your Honor, but they are not really applying these standards because he is being confined due to a mental problem. They are commuting this because he has been transferred from a state prison where he has already been subjected to an indeterminate sentence and then sending him to these mental hospitals. So, he is still under the custody of the Commissioner of Correction.

While the Commissioner of Correction does give the good time credit for a person who has been transferred from the state prison, we submit that there are different usages, purposes, and availability of facilities in the mental hospitals. We believe it is obvious there is a difference between the mental hospitals and the state jails.

But to counter this argument, the Attorney General has stated at page 7 of his reply brief that it is difficult to see how this diminishes the validity of Section 230, subdivision (3). "These are two classes of inmates who have been transferred to state institutions that have programs specifically designed for their specialized needs. Willing participation and performance in these treatment programs under state supervision would certainly call for the awarding of good time."

I would submit to this Court readily that this is quite a cogent argument. However, I would pose a question to the Attorney General. If these facilities do programs that are beneficial to the inmates and if they do believe that these programs meet the specialized needs of the inmates, then why does not the Commissioner of Correction give good time credit for the amount of time that a person spends in these exact facilities if it is pre-trial confinement? They do not give good time on this period of time. So, I believe that the different types of programs is not related to the giving of good time, and I think this is a specific example which points that out clearly.

Q Assuming that it was wrong in that area, that would not be any basis for the holding here, would it?

MR. SORGE: I believe it would be somewhat of a basis, because I believe, in the first place, it shows the practice in New York State. In the second place, I would argue that it is at least an indication of the state's intention. I believe also that we find there is supposedly a uniform scheme, you know, granting the commutation of a person's sentence, and I believe that this would also have an effect on that.

I believe that this presents a definite conflict in the state's practice. Secondly, we have other examples which present similar examples of conflict. For example,

if a person has already been sentenced and has been received in a state prison, if he is subsequently transferred back to a county jail for a post-conviction remedy and remains in the county jail until that post-conviction remedy is completed, then transferred back to the state prison, he gets good time credit for the amount of time that he spent in the county jail. So, here he is being detained in exactly the same facility as are the persons that are discriminated against under Section 230, subdivision (3). However, as a matter of policy of New York State, he is getting good time credit for that.

I submit to this Court that this is an incredible inconsistency, and I believe that the explanations just submitted to Mr. Chief Justice would apply equally here. Here is an indication of the intent of the legislature, et cetera.

Lastly, the Attorney General has argued that the district court misapplied the standards of Equal Protection in that it did not consider their argument that good time should not be reduced from the pre-trial detention period because in effect it reduces the amount of time that a parole board has to consider whether a person whould be eligible or not for parole. I submit that the district court did in fact consider this proposition.

On page 63a of the Appendix, the district court

came out in extremely strong language as a matter of fact. It stated that the fears of the Attorney General in this case are wholly illusory. I believe this is a very clear statement of the position of the district court.

Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sorge.

MR. COLODNER: Your Honor, I belive I have two minutes left.

MR. CHIEF JUSTICE BURGER: Yes, you have a few minutes left.

REBUTTAL ARGUMENT BY MICHAEL COLODNER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. COLODNER: I would like to answer two of the contentions raised by the attorney for the appellees. First of all, there is a certain amount of play in the institution between people who are once sent to state prison and then for various reasons have to be sent to institutions. And one of the examples raised is someone who has to return to the county jail because he is contesting a post-conviction proceeding like coram nobis the validity of his sentence, and he might remain in this county jail for a few days or a few weeks, depending on how long it takes.

Certainly we are not going to say that these people are not to be awarded good time, because in the course of their program in the state prison they have to leave for a

short instance. In fact, if we did deprive these people of good time, we would be raising serious constitutional problems about a denial of access to the courts if an inmate in state prison knew that if he wanted to utilize a state post-conviction remedy but would also be losing good time, he might be deterred in utilizing that remedy.

Q Of course, he might be confined to county jail temporarily for some other reason.

MR. COLODNER: That is true.

Q As a prosecution or defense witness for somebody else.

MR. COLODNER: They are all possibilities. The system does not work on absolute perfection. What if someone were sick for two weeks? Could you get good time?

I would also like to add one more thing. Before lunch the argument was made that the Time Allowance Committee operates solely as a punitive entity. It does not at all. The Time Allowance Committee is what gives credit for good time. This is an evaluation that takes into account the entire institutional experience of the inmate, not whether he has been good or bad. In fact, in the Superintendent's Proceeding that was mentioned previously, which is purely a punitive action, the Time Allowance Committee can recredit any time subtracted by the Superintendent's Proceeding when the date--

Q Pardon me. This argument does not, on your submission as I get it, that under subdivision (3) there is no discretion to consider jail time at all, is there?

MR. COLODNER: No, that is--

Q And what you are talking about is the procedure which deals with the only situation in which it may consider good time, namely, time spent in the prison.

MR. COLODNER: That is right.

Q Is that not right?

MR. COLODNER: But my point I am making in this argument was to show that the time spent in prison is evaluated from a rehabilitative standpoint and not necessarily only from a punitive standpoint.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:08 o'clock p.m. the case was submitted.]

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