In the

Supreme Court of the United States

ROBERT EDWARD MARSHALL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 72-5881

Washington, D.C.
October 16 & 17, 1973

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT EDWARD MARSHALL, Petitioner,	:	
v.	:	No. 72-5881
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.
Tuesday, October 16, 1973

The above-entitled matter came on for argument at 2:47 o'clock p.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:

JAMES F. HEWITT, ESQ., Federal Public Defender, 450 Golden Gate Avenue, San Francisco, California 94102; for the Petitioner.

MRS. JEWEL S. LAFONTANT, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-5881, Robert Edward Marshall v. United States of America.

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

ORAL ARGUMENT OF JAMES F. HEWITT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HEWITT: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

I would like to beg the Court's indulgence to briefly discuss some of the relevant facts to put this case in its proper perspective.

Approximately four years ago, Robert Marshall robbed a bank. He did not use a gun and he did this for the purpose of obtaining money to buy heroin for his narcotics addiction. He was arrested and prosecuted for bank robbery. It appeared that he had two -- or rather three prior felony convictions in the courts of the State of California.

At or about that time, the District of Columbia Circuit en banc decided the Watson case, holding the two prior felony exclusion unconstitutional under the due process clause as denying equal protections to a narcotics addict under Title II, and a request was made of the United States Attorney, in light of Mr. Marshall's obvious addiction, to charge him with a crime not one of violence, so that at least he could invoke

in the District Court the Watson decision. That was done. Marshall was charged with entering a bank with intent to commit larceny while it carries the same penalty as an armed bank robbery, it is not robbery under the statute and therefore he was not barred by that provision of the Narcotics Act.

Marshall pleaded guilty and submitted to the District Court that he should be eligible for consideration under Title II for prison commitment as a narcotics addict and for treatment, and that the two prior felony exclusion was an unconstitutional discriminatory classification.

The judge felt that the -- the trial judge felt that this was not the law in the Ninth Circuit, he declined to follow the Watson decision, and sentenced Marshall to ten years under 18 USC 4208(a)(2), providing for parole at any time, the same maximum sentence for which he could be held under Title II commitment, ten years, and recommended in his commitment that he be given treatment for his narcotics addiction in federal prison.

Marshall has received no treatment to date. I talked with his caseworker before leaving San Francisco Friday.

It was determined at the time to wait until a little later and see what had developed with respect to this particular line of authority, and Marshall filed a 2255 application, I felt prematurely because I was waiting ror some other decisions to come down, but at the time his 2255 petition was heard by the

District Court Watson was the only significant case still on the books and Judge Peckham, following that decision, declined to set aside the conviction on the grounds that the discriminatory classification prevented him from committing him under Title II of the Narcotics Act.

An appeal was taken to the Ninth Circuit and the Ninth Circuit agreed with the District Court that the classification was not an arbitrary one. In the interim, the District of Columbia Circuit had decided Hamilton, which clarified the situation by pointing out that any two prior felony convictions, whether narcotic related or not, would be a discriminatory classification, and then while the petition for cert was before this Court, the First Circuit followed the Watson decision and the Hamilton decision and held the discriminatory classification a violation of due process by denying equal protections, so we have at the present time the First and the District of Columbia Circuits holding the statute unconstitutional as it improperly discriminates, the Fifth and Ninth Circuits holding that the classification is a reasonable one.

Q Mr. Hewitt, what do you think is the applicable standard here?

MR. HEWITT: I knew that one of Your Honors would ask that question. I would like to say that the trend of cases, after Jackson v. Indiana and a number of District Court cases,

some of which were cited by this Court in Jackson, perhaps are leading to a conclusion that treatment for an ill person, and if we assume the premise that a drug addict is an ill person, may very well be a fundamental interest that the state or the government must provide.

I would use an example that if we are going to commit a prisoner to the medical center at Springfield as mentally ill, I don't think he can be sent there and then not treated for his mental illness. And I certainly don't think that you can deprive him of the treatment for his mental illness on the grounds that he might have a bad criminal record.

I would like to say that this is a fundamental interest that we are talking about, but I realize that the Court has not gone that far, and I would have to say that perhaps we are talking about an interest more in the social welfare-economic realm than in a fundamental interest area.

Q Would you carry that to the point of saying that a District Judge in sentencing would not be permitted to take into account prior criminal conduct?

MR. HEWITT: Oh, no. No. In fact, this is the crux of our argument, is this: We say Marshall had a right to be considered by the District Court. Now, if the District Court looked at his record and said, well, he is a dangerous person, his crimes of violence are recent, he has crimes of violence, he has a violent background, he is not likely to respond to

treatment. The District Court can exercise this discretion and not commit him under Title II. But Marshall never got that chance, and he never got the chance because the two prior felony exclusion in Title II operates as a conclusive presumption that he is not likely to be rehabilitated, and that is the irrational classification of which we complain.

Now, I would like to point out to Your Honors --

Q If I understand that statement, you agree that the applicable standard is rationality?

MR. HEWITT: Yes, Your Honor.

Q Then I think both sides are in agreement as to the --

MR. HEWITT: Yes, Your Honor.

Q All right.

MR. HEWITT: I would like to point out that we are talking in the Narcotics Rehabilitation Act about two titles. Title I is the civil commitment in lieu of prosecution, and the thrust of the legislative history aimed toward this Title I is talking about escaping punishment and so forth, and I certainly have no quarrel with these classifications as they may relate to Title I. But Title II is a prison type commitment. It is a commitment to a federal prison where the drug rehabilitation program is made available within a prison sentence, he is under the supervision on after-care of the Board of Paroles, as any other prisoner, and he certainly is

not in any sense of the word escaping punishment, if punishment is a valid objective.

So there are distinct differences between Title I and Title II. The felony convictions that Title II talks about, and of course the combined provisions apply to Title I with equal force, need not be violent felonies, they need not be current. They could have been twenty years ago. It could have been two convictions, one for mail theft and one for forgery. There is no showing, no necessity that they even have been drug related. They may be in one jurisdiction misdemeanors and in another jurisdiction felonies. They may be subject to expungement in California but perhaps not subject to expungement in the District of Columbia, since there is no provision in our Federal Code for expunging a criminal record. If it is expunged, it doesn't count, so it is obvious that the two prior felony provision is arbitrary even as it is applied.

Now, the question that we would like this Court to consider is whether or not that classification of two prior felonies is reasonably related to affect the legislative purpose of the Narcotic Addict Rehabilitation Act, and we submit to the Court that it is not. There absolutely is no rational connection between two prior felony convictions and whether or not the addict needs treatment, and I think a common sense approach shows that it operates in effect as a conclusive presumption without irrational nexus.

I think if we ask the man on the street a very common sense series of questions: What do you think of the fact that perhaps 50 percent of the drug addicts or 50 percent of the street crimes are committed by drug addicts? He would probably say I agree with you, that is probably correct.

Q Do I understand, Mr. Hewitt, in the same institution, the same penal institution, federal penal institution, there is provision for treatment of drug addicts, and that drug addicts not precluded under Title II go to that institution and they get treatment for their addiction. But this fellow, because he has had two prior felony convictions, goes to the same institution but gets no treatment?

MR. HEWITT: That is correct, Your Honor.

Q That is the way it works?

MR. HEWITT: That's right.

Q What is it that precludes him from getting the treatment, the availability of facilities, or are you suggesting he is absolutely barred from getting it?

MR. HEWITT: At the present time, he is simply not committed under the Narcotic Addict Rehabilitation Act.

Q That is not quite my question. Are you suggesting that there is a bar, some kind of an absolute bar to his being treated for his narcotics addiction while he is in prison?

MR. HEWITT: Oh, no, Your Honor. If he is at an

institution that has a drug program, and if he is within a year or a year and a half of parole, they may put him into a drug program, but it is discretionary with the prison officials. Our point is that he should have an opportunity, as any other member of the class, to be considered by the District Court for commitment as a drug addict, where he is guaranteed drug rehabilitative treatment. Now, I am not qualified to discuss whether or not treatment at the end of the parole period is better or worse than treatment at the beginning of the prison period. It would seem to me that a person whose antisocial behavior is a product of drug addiction would be better off to get into a prison program that is oriented to drug rehabilitation from the beginning, so that the whole rehabilitation program can be keyed to the root cause of the problem which would be heroin addiction in this particular case.

Q Well, I am sure no one would challenge that as a matter of common sense or good sound policy, but the question is whether that rises to a constitutional level. Isn't that it?

MR. HEWITT: Yes, it is, Your Honor. And it does, I think, when the classification of having been convicted of two prior felonies, bars him from consideration with other members of the class similarly situated, because it is our position and the position of the District of Columbia Circuit and the First Circuit that there is just no rational relationship between

two prior felonies and likelihood to be rehabilitated, which is the prime purpose of the Narcotic Rehabilitation Act.

Now, the government ceased to justify this classification on the basis that it is an effort to limit resources available for the program. Now, there are some comments in the legislative history concerning available resources, and I think a careful perusal of the legislative history will show that most of the Congressmen and Senators were talking about Title I and the facilities that might have to be built under the Public Health Service in order to handle the intake that would be created by opening Title I, the commitment in lieu of prosecution. Title II, however, commitments to federal prisons, ostensibly at least, the convicted prisoner -- and it is almost always a felony -- the convicted felon will go to a federal prison anyhow.

Q Well, Title I committees wouldn't go to the same prison as Title II?

MR. HEWITT: Title I committees go to the Surgeon General. They are not committed to prison, they are not sentenced, it is not a sentencing provision. That is the commitment in lieu of prosecution. That was the area I think where the legislative history indicates there may have been some concern about available resources. Certainly not as to Title II. No prison has had to be built, because the prison is going to be in prison anyhow, it is just a question of whether or not

while in prison he is going to get drug rehabilitation treatment or whether he is going to get straight prison treatment that may or may not be drug oriented, depending upon the whim of the prison at the particular time.

The government seeks to justify it on the grounds that available resources is the secondary purpose, and I don't think the legislative history supports it. The statute has a built-in escape provision. If at any time the Attorney General finds that facilities are not available or are limited, he may certify and not take any drug addicts into the Title II program. So the availability of funds is always subject to this escape valve built into the statute.

Now, if the rational ---

MR. CHIEF JUSTICE: We will pick up with that thought the first thing in the morning, Mr. Hewitt.

MR. HEWITT: Thank you very much.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned, to reconvene on Wednesday, October 17, 1973, at 10:00 o'clock a.m.]

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT EDWARD MARSHALL, Petitioner,	:	
v.	:	No. 72-5881
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.
Wednesday, October 17, 1973

The above-entitled matter came on for further 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:

JAMES F. HEWITT, ESQ., Federal Public Defender, 450 Golden Gate Avenue, San Francisco, California 94102; for the Petitioner.

MRS. JEWEL S. LAFONTANT, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will continue the arguments in Marshall v. United States.

Mr. Hewitt, you have seventeen minutes remaining.

ORAL ARGUMENT OF JAMES F. HEWITT, ESQ.,

ON BEHALF OF PETITTIONER--RESUMED

MR. HEWITT: Thank you, Your Honor. Mr. Chief Justice and may it please the Court:

As we were discussing yesterday, it is our position, as the Court of Appeals of the District of Columbia held in Hamilton, that the two prior felony exclusion opeates in effect as a conclusive presumption of ineligibility and that the rational connection between two prior felony convictions, with no delineation as to the type of conviction, the time of conviction or other circumstances, in effect would deprive an applicant who would be otherwise eligible for commitment under the prison provisions of Title II from an opportunity to have consideration and a hearing.

Now, this Court in last term in the Food Stamp cases, Department of Agriculture v. Murray and Morino in effect struck down a provision similar to that which operated as a conclusive presumption thereby preventing a fair hearing of the merits of a person's eligibility. I would submit to Your Honors that that would be basically the same problem here.

This in effect fetters the hands of the trial judge

and prevents him from an opportunity to fairly evaluate whether or not the particular addict should be sent to prison for addict treatment, or whether he should be sent as a straight offender and subject to whatever rehabilitative treatment might be available.

We feel that the trial judge's hands should be unfettered, that this congressional classification is in effect an irrational one and defeats the legislative purposes of the Act.

It would appear to us that the addict in this particular case, Mr. Marshall, did have in effect almost a fundamental right to consideration for fair and effective treatment of his addiction.

As we pointed out yesterday, we are not talking about a --

Q Excuse me. Do you have to go that far or is it enough for the purposes of your case to say that he had a right to put in evidence on the subject to trigger the District Judge's discretion in the matter?

MR. HEWITT: Yes, Your Honor.

Q You don't claim an absolute right to have rehabilitative treatment in every case?

MR. HEWITT: Oh, no. No, Your Honor, but he certainly had a right to have the judge consider that and in the exercise of his sound judicial discretion determine that this is the type of addict who is likely to be rehabilitated and who may

treatment. The problem here is that the judge couldn't do this under the statute. He was barred. He was in effect prevented from even an opportunity of considering this man's background. Now, it may well be that Congress has decided to keep hardened criminals out of Title II, but the judge can do that. He can do that by just simply not exercising his sound discretion and committing him under Title II of the Narcotics Act.

Q Does the power of Congress to fix the jurisdiction of federal courts constitute any kind of a barrier here to what you are driving at?

MR. HEWITT: Oh, I think certainly Congress could limit the jurisdiction of the federal courts and provide that no addict could be committed for treatment. But where it has created a class, and a class to which Mr. Marshall is a member, and then excluded him from the class on the basis of an irrational classification, it is our position that he has been deprived of due process by virtue of the denial of equal protection.

I would have to concede that Congress doesn't have to give adequate treatment to addicts. It could limit the court's jurisdiction in the area of consideration, but it certainly can't prevent Marshall, the petitioner here, from consideration on the basis of this irrational classification.

Now, the government seeks to justify this by the expedient explanation of possible subsidiary purpose in the

legislation to conserve economic resources. They could have made that argument in the Department of Agriculture Food Stamp cases, that they wanted to limit the number of people eligible for Food Stamps to save money, and thereby justify the classification. But it wouldn't be any more justified in that particular case than it would be here.

Now, most of the legislative history that the government has cited relates to some apprehensions that Congress had in connection with expanding the existing Public Health facilities for the Title I, the prosecution in lieu of -- the commitment in lieu of prosecution provision, or Title II, the voluntary commitment provision.

It would appear from the examination of the legislative history that the Bureau of Prisons was not too concerned with any drain upon their resources. They have the prisons, the person is going to go to prison anyhow, it is a question of whether or not he is going to go and get addict treatment or whether he is going to go and in effect be deprived of addict treatment, or get it only at the whim of the Bureau of Prisons.

Q Do I understand that you seem to concede the power of Congress to have a distinction between -- a distinction which permits the segregation of what you call hardened criminals, men with two, three, four convictions, from first offenders who are narcotics addicts?

MR. HEWITT: Yes, Your Honor, I think they do. If

they have a test that is fair and certainly a test that is not based upon a conclusive presumption of being a hardened criminal simply by virtue of two prior felony convictions. What we object to is the fact that these two prior felonies that have been thirty years ago, they could have been for the most innocuous of offenses, and to say that a person is a hardened criminal because thirty years ago he was convicted of theft of mail or forgery of a Treasury check, two relatively innocuous felonies, to say that he is a hardened criminal and therefore is not eligible for treatment in prison as an addict, I think is just certainly irrational, and this is our objection.

If there are standards applied to the barring provision reasonably related to the purpose of the legislation, perhaps our position would not be quite so strong. But I feel here that what we have basically is a recognition that narcotics addiction is the root cause of a good deal of crime. There is an effort on the part of Congress to traat addicts by giving them treatment in prison, and then to say that these objectives will be fulfilled by barring from that very treatment those with criminal records is an irrational conclusion. In fact, it is almost absurd, and that is certainly our position in this case.

Thank you, Your Honors.

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

Mrs. Lafontant?

ORAL ARGUMENT OF JEWEL S. LAFONTANT, ESQ.,

ON BEHALF OF THE RESPONDENT

MRS. LAFONTANT: Mr. Chief Justice, and may it please the Court:

In a statement of facts yesterday, petitioner remarked that there was no gun involved in the robbery of the bank. I do want to bring out, however, that when petitioner entered this bank, he presented a note to a teller who happened to be a moonlighting police officer, and that note said "I have a gun, I don't want to hurt anyone, just hand over the money."

Petitioner also states that that crime was reduced from a crime of violence -- certainly robbery of a bank is a crime of violence -- and it was reduced to larceny. Had it not been reduced to larceny, he would have been excluded from the provisions of Title I and Title II, as having been found guilty of a crime of violence.

Petitioner contends that the provisions of Title II of the Act, which excludes persons with two prior felony convictions from its benefits, is unconstitutional under the equal protection clause embodied in the due process clause of the Fifth Amendment.

In his brief, he compares Title III with Title II, complaining that a person like himself, a possessor of a two-felony conviction record, cannot trade his felony, his third felony conviction for commitment under Title II, while a person

with three or more felony convictions, in fact any number of felony convictions, may be committed under Title III, as long as he has completed all of his prior sentences of conviction and as long as there is no pending criminal charge against him.

Petitioner argues that this classification is arbitrary and unreasonable and has an irrational basis. If we look at the Act, we can say just from a mere cursory reading of it that the purpose is obvious. This isn't a case where we have to go to the Congressional Record, review the hearings, review what all the Representatives said, although it is very interesting reading, to interpret the Act's meaning. The Act is unambiguous and it is clear.

It provides for the treatment and rehabilitation of narcotic addicts and, in addition, provides in Title I and Title II the commitment for treatment in lieu of penal incarceration. The Act is three-pronged. Title I provides for civil commitment in lieu of trial for certain consenting narcotic addicts charged with federal offenses. Title II, the one that we are concerned with today, provides for similar civil commitment in lieu of penal incarceration for narcotic addicts who have already been convicted of a federal offense. And Title III provides for civil commitment at the instance of the addict himself or at the instance of a related individual.

Now, it is clear from Title III that Congress did not wish to foreclose the multiple offender from treatment for his

addiction, because under Title III no person is excluded except a person who has a pending charge against him or who hasn't completed his sentences under prior convictions.

In other words, a multiple offender can be committed under Title III to a hospital for treatment for his addiction, but we must recognize that Title III, the Title III addict doesn't present any new menace to society. The person under Title III is a person who is free in the community, already having paid his debt to society, and when he seeks treatment as an addict he is not entering to escape a pending charge or any future punishment. He is sincerely seeking physical and psychological therapy voluntarily.

Petitioner makes much to do over the fact that a third person can have himself committed under Title III and the fact that a third person can bring him in makes this less than a voluntary act. But whether or not the request for treatment under Title III is voluntary, that is really not too important. The important item is that the addict is already in the community and in seeking help is removing himself from free intercourse with society for hospital treatment.

Petitioner asserts that treatment for an ill person should be guaranteed and that he would like it to be a fundamental right, and that the state should provide treatment for all these people. In Powell v. Texas, Mr. Justice Marshall stated that "This Court has never held that anything requires

that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects."

We are not even arguing here the petitioner should not receive treatment. We do maintain that he has no basic right to trade treatment for commitment.

Petitioner would have us believe that in denying him benefits under Title II that he is denied all types of treatment. This is not true. He is only being denied the privilege of trading that commitment under Title II for penal incarceration.

I am advised by the Bureau of Prisons --

Q Mrs. Lafontant, if a defendant is given treatment under Title II, if he is eligible for it, might he be released into the community prior to the probable time he would be released if he were serving a prison sentence?

MRS. LAFONTANT: Yes, indeed, and that is a very good point that you are raising, Mr. Justice Rehnquist, because I am addressing myself to that even later in the argument, but the answer to it is definitely yes.

I am advised by the Bureau of Prisons that all addicts in the federal prisons are eligible for treatment and do receive treatment, and the only thing that limits the kind of treatment they get is the lack of resources and sometimes the lack of motivation of the offender himself. But in all of our federal institutions, we have rehabilitative programs set up. At this

time, we have 14 intensified medical programs, and by the end of the fiscal year we expect 16. However, there is a difference, which you have addressed yourself to, Mr. Justice Rehnquist, that the people committed under NARA are treated somewhat differently from the non-NARA addicts. The NARA addicts are put into intensified treatment immediately, and they are released on an average within 17 months back to the community. Many of them are released within six months of the time they enter the treatment. But on the average, I am informed, it is 17 months and then they are released into the community with intensive follow-up care.

In response to the inquiry of the Chief Justice as to whether or not non-NARA addicts are foreclosed from treatment in federal penitentiaries, the answer is definitely no. We do have rehabilitative treatment in the jails for persons who are serving regular federal prison terms and who happen to be in addition addicts. They all receive some treatment upon commitment, if no more than when they first get there they are dried out within three days to three weeks. In fact, the physiological desire for narcotics has been gotten rid of within three months to six months. So they do receive that.

In addition to that, we have --

Q Well, that is just the result of being locked up in a place where there are no narcotics available though, isn't it?

MRS. LAFONTANT: One thing is that but --

Q You can call it treatment, if you will, but that just happens to everybody who gets locked up where there are no narcotics available.

MRS. LAFONTANT: That would be true, but I understand in our federal prisons that we have medical doctors who help these people during their withdrawal periods. In addition to that, we have counselors who help these people who are not NARA, committed under NARA, to help them in their motivation, also to help them not only get rid of their addiction but actually to get rid of their non-criminal behavior through various social and psychological services that are rendered in the jail.

Q Well, isn't there a six-week period of isolation during which all in-coming prisoners are classified for a wide range of purposes, that is their health condition, their --

MRS. LAFONTANT: Yes.

Q -- rehabilitation prospects, and so forth?

MRS. LAFONTANT: Yes.

Q And is it during this six-week period that they try to find out what their narcotics situation is, if they have one?

MRS. LAFONTANT: They try to find that out upon immediate entry, which takes up to six weeks, but they often find out within the first week whether or not the person is an addict. First they ask the offender himself, are you on drugs,

what do you use, and are you truly an addict. And of course, they have to depend a lot upon what the offender tells them also, but they do have follow-up medical treatment as well as psychotherapy in the ordinary federal prison.

I am also advised that in addition to -- they set goals for these people as they come in, as to whether they can finish high school or finish grade school, try to teach them, whether or not they can learn a trade -- all of this is started with this person, whether or not he is an addict, but in addition to being an addict he does get help in that area. And I am informed the only limitation on it is lack of resources and the lack of motivation of the prisoner himself. He may not use the resources that are there.

The intensified treatment, I am told, however, doesn't begin until 12 to 18 months before the prisoner is to be released, so the person who is committed under NARA starts getting his intensive treatment immediately 12 to 18 months and then he is to be released into society; whereas the person who has had the longer sentence, the intensified treatment, I am told, does not begin until 12 to 18 months before he is to be released, and this is supposed to be because the experts feel that it is too early to start an intensified program preparing the inmate for release to society earlier than 12 ot 18 months.

It means, however, that a person who has a ten-year sentence would not be able to go back into society within six

months or within 18 months because they would figure his time from the length of his term and figure back.

While allowing commitment under Title III, Congress did not want the NARA to supersede in all instances the established commitment procedures for all offenders who happen to be additionally narcotic addicts. They didn't want persons facing a criminal charge to use the Act to escape punishment. The Act has created a special benefit for offenders who are also narcotic addicts and in so doing has set up standards of eligibility. And, as Mr. Justice Blackmun brought out yesterday, the applicable standard here is one of rationality.

The appellant claims that the standards set up by Congress, namely the exclusion of a certain class of convicted felons, is unreasonable. What is the nature of the privilege or right created by this Act which grants certain classes of offenders the option to trade imprisonment for commitment for rehabilitation purposes? Can the offender trade off his addiction treatment for the rest of his term? To what extent can Congress set up standards of eligibility for benefits granted by it?

Congress has said that persons like appellant, who has been convicted of two prior felonies, cannot escape punishment by the mere fact of submission to treatment for his addiction. The exclusion of the class of addicts to which petitioner belongs does not constitute as to appellant a deprivation of

due process. The question of due process was taken care of at the time of his trial.

President Lyndon Johnson, in urging the passage of this Act back in 1965, when he addressed Congress, felt that the protection of the public was not only important but it was required, and he said, "The return of the narcotic and marihuana users to useful productive lives is of obvious benefit to them and to society at large. But at the same time it is essential to assure adequate protection of the general public."

Q I understood Mr. Hewitt's argument, Mrs. Lafontant, to be the Fifth Amendment due process which embraces equal protection, that is that he was not claiming a violation of due process in general but only of the Bolling v. Sharp type of due process which embraces the equal protection notions of the Fourteenth Amendment. That wouldn't be taken care of just by giving him a trial, I take it?

MRS. LAFONTANT: Yes, but I respectfully submit that there is nothing in this case that would indicate that what Mr. Hewitt is saying is at all true, because he is saying because this man is an addict he is entitled to the same treatment as everyone else who happens to be an addict. There is no constitutional guarantee that addicts are going to have certain treatment over and above -- I mean that NARA addicts are to get better treatment than non-NARA addicts.

Q Well, I thought he pretty well conceded that much

in his argument but said that it is irrational for Congress to say that just because you have to felonies you can't get NARA treatment under Title II, for which you would otherwise be eligible.

MRS. LAFONTANT: I would say that for the protection of society, that it was necessary for Congress to set up certain standards, and unless these standards are irrational or unreasonable, then petition is not in a position to complain about lack of due process.

Representative Helstoski, at the hearings in 1966, followed up on what President Johnson has -- the quote that I just read from President Johnson's address to the Congress. He said House Bill 9167 is not a bleeding heart measure which would result in releasing people into society who are dangerous to others or to themselves. Neither is it a measure which could be used to make excuses and provide a cover for vicious criminals. The purpose of this bill is the same as the purpose of the present laws and that is to protect society.

Now, certainly the interests of the public at large, yes, the law-abiding, the non-addict public, if you please, is served by the withholding from society for a period of time prescribed by the court of repeat offenders, and reasonable indeed is the classification which is based upon the need to withhold from free intercourse with society those elements who have offended it, who have committed certain crimes, more than

a certain number of times. This Court ---

Q Well, was the idea that double offenders are less likely to be rehabilitated? Is that what the government --

MRS. LAFONTANT: Yes, sir. Yes, sir.

Q Some rough judgment like that?

MRS. LAFONTANT: Some rough judgment like that which is supported by some of the cases, which I would like to go into, and supported by the findings of NARA itself.

Q Isn't there another factor that is the mixing of first offenders with men who have got two, three, or four convictions while they are trying to rehabilitate these offenders with only a single felony?

MRS. LAFONTANT: Certainly. I would agree with petitioner that there should be a classification that could keep these hardened criminals apart from the first offender or the youthful offender.

Q Well, didn't Congress have that in mind in separating people with more than two felony convictions?

MRS. LAFONTANT: Yes. In fact, Congressman McClory, from the State of Illinois, presented that point of view before the Congress very clearly because he pointed out that what he was concerned with most and felt that this Act would be concerned with most would be addicts who are primarily addicts and secondarily criminals. He also said that it would be a mistake to mix the hardened criminal with the young, hopeless,

hapless addicts who had committed only one crime.

Q Mrs. Lafontant, this is beside the point, but do you know, is the institution at Lexington still operating?

MRS. LAFONTANT: Yes, it is, sir.

Q Are most of the NARA people sent there or Springfield, if you know just as a matter of routine?

MRS. LAFONTANT: As I understand it now, the NARA people are located primarily at Milan, Michigan, Danbury, Connecticut, Terminal Island, California, Alderson, West Virginia, and Fort Worth, Texas.

Q Certainly not Springfield?

MRS. LAFONTANT: Not Springfield. And Lexington evidently is out, too, although at the time of the passage of this Act, Fort Worth and Lexington were the two named institutions.

This Court has so held, that is, referring to the multiple offender, has upheld the constitutionality of the habitual offenders statute in Moore v. Missouri and Graham v. West Virginia. In the Moore case, quoting from People v. Stanley, the Court said the punishment for the second is increased because by his persistence in the perpetration of crime, he has evinced a depravity which merits a greater punishment, and needs to be restrained by severe penalties than if it were his first offense.

Q What year was Moore, Mrs. Lafontant?

MRS. LAFONTANT: Graham was 1912, Moore was about 1896.

Q You don't have them cited in your brief.

MRS. LAFONTANT: Yes. Moore is 159 United States 673, and Graham is 224 U.S. 616. So important is the offender's prior history of criminality that most states make a person who is convicted of more than two crimes ineligible for probation. In many states, like Wyoming, only first offenders can be granted or even considered for probation. And on the federal level, we find this is important, too.

In the policy statement of the Drug Abuse Manual of April 20, 1973, issued by the Federal Bureau of Prisons, it is made clear that previous criminality and seriousness of offenses are reasonable considerations in parole matters.

And Title XXVIII, section 2.24 reveals that the United States Board of Parole generally considers such factors as an offander's prior criminal record and the nature and the pattern of his offenses. Thus, there have been both judicial and legislative determinations of the rationality of the classifications in issue here. It is neithre irrational nor unreasonable for Congress to find a second-time offender presents a greater risk to society than the risk or menace presented by the one-time offender.

Even NARA, with its carefully selected clientele, has concluded that first offenders fare better than repeaters.

In the creation of statutory rights, Congress can define the class of persons who will receive a benefit of the statutorily created right.

Q Well, what do you mean by "fare better"? That they respond -- first offender responds more readily to treatment than do multiple offenders?

MRS. LAFONTANT: Yes, sir, and there is a greater degree of success in the community after they are released, the first offender than the repeater.

Q That is in terms of narcotics addiction?

MRS. LAFONTANT: As far as narcotics addiction primarily, but even for subsequent crimes, because the theory is that most of the people who are convicted under NARA, the only reason they are guilty of a crime is to support their habit, which is still questionable, whether that is true or not, but that is the theory they are going on so they figure that if they cure the addict and he doesn't need to steal in order to support an expensive habit, then he can become rehabilitated. And they have found that the first offender fares better than the repeater in both -- on both counts, as an addict and as a criminal.

Q Well, isn't this whole enterprise an experimental one as yet?

MRS. LAFONTANT: Yes. As our brief points out, I think more than half of our argument is devoted to the fact that

this was a pilot program initiated, this is the first major act in this area that has been taken since 1914. It was recognized that very few people really know much about addiction and the problems and the cures, it was the beginning program, a pilot program, they wanted something to be done, but at the same time they knew that not only because of lack of resources but because of lack of knowledge, they weren't willing to open it up to the whole addict public. They had to start somewhere, and in starting somewhere they had to draw classifications also, and this would certainly be a reasonable classification.

Since 1966, many institutions have been built and it has included more and more people even now. They have gone further than just, say, the hard addict, they treat people who are on barbiturates and emphetamines. But you are perfectly right, Mr. Chief Justice, that it was a pilot program and the line had to be drawn somewhere. We respectfully submit that drawing the line at this point was perfectly reasonable and that the Court of Appeals' opinion should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hewitt?

REBUTTAL ARGUMENT OF JAMES F. HEWITT, ESQ.,

ON BEHALF OF PETITIONER

MR. HEWITT: If I may respond to some of the Solicitor General's suggestions, the references in the legislative history to pilot and experimental I think were aimed directly for the

most part at Titles I and III. The concept of having civil commitment in lieu of prosecution or voluntary commitment for addicts was a new concept. We had never had it before.

During the legislative history, they discussed the experiences in New York and California with this type of commitment, and I certainly don't think that there is anything new or anything novel or experimental about giving the best treatment that the prison system can to an addict who is in prison. I don't think certainly that we can say that this was any great change.

Q Well, is it the fact, Mr. Hewitt, that if one is eligible, the chances of getting to the streets if he comes within Title II are better than if he is not afforded Title II?

MR. HEWITT: No, Your Honor. And this is the fallacy of the government's argument. At the present time the reason that the addicts are being released in approximately 18 months after they are committed under Title II is that the only addicts in prison are check forgers and mail thieves. No one with any prior record is there. No one with any crime of violence is there. These are fairly moderate sentences that are being given, probably of five years or less. It says Title II provides that he can't be sentences in excess of the maximum that could be imp sed. We are not talking about bank robbers or kidnappers or people that engage in violent crimes.

Q What about the government's suggestion that

experience has shown that the multiple offender, an addict, who gets back into society is more likely to commit another crime than is the single offender, also an addict, who is released?

MR. HEWITT: I don't know where that conclusion comes from. It is certainly not my experience, and I have been in the criminal justice system for thirteen years. It depends upon the individual. It depends upon his propensities other than addiction. I have found from my experience with the older addict, with the longer criminal record is more amenable to rehabilitation than the young kid who is just getting started who doesn't have the maturity and the experience of the older person.

Q Mr. Hewitt, would you agree in broad terms that nobody really knows very much about addiction and that there is not even yet any medical certainty that anybody can be fully rehabilitated?

MR.HEWITT: I would certainly agree that that is a problem. But I hope we have come a long way since 1896 in penal reform. I certainly hope that we are doing something for addicts in prison. But I can assure Your Honors that addicts sentenced to federal prisons do not get treatment unless they are in a NARA program or unless they are, one, in one of the prisons that has a program with openings -- and there are only 12 of those, I understand, out of 28 -- and, two, they are one year or 18 months away from parole.

Edward Marshall was sentenced by the District Judge

to ten years, parole at any time, and a specific recommendation in the judgment that he be given treatment for his addiction, and he isn't getting it, simply because of his prior felony record. He is not getting any treatment and he is an addict in prison.

Q Did you say there are 12 facilities where this is --

MR. HEWITT: That is my understanding, 12 facilities, 12 federal prisons that have available addict facilities, out of 28.

Q Are those the institutions to which they commit the Title II --

MR. HEWITT: I am not sure that all of them have available facilities for Title II, but they do have some type of drug treatment program in existence, and I think it is fairly well conceded in the government's response to my memorandum in response to their memorandum in response to the petition for certiorari that where they point out that there are only so many institutions and that addicts do not get treatment on a straight sentence until the end of their term and only if they are in an institution where such treatment is available.

Q What do you mean by "treatment"?

MR. HEWITT: Treatment keyed, as is contemplated by Title II of the Act, to addiction as the root cause of the

person's antisocial conduct. Now, what the medical differences are, I am not qualified to say. There must be a different treatment, otherwise Congress wouldn't have had to pass Title II. But at least under Title II -- and I would point out to Your Honor, that is not a civil commitment, the statute itself. The phraseology of Title II says a commitment for treatment. It is a commitment to prison. The civil commitment is Titles I and III. It is keyed to psychiatric, psychological treatment, to testing and to various --

Q Are you telling us that Marshall is getting no treatment?

MR. HEWITT: None at all.

Q He is not getting treatment.

MR. HEWITT: Right.

Q Suppose though he were in a facility where treatment is available, would he -- and they gave it to him -- would it any different from what he would get if committed under Title II?

MR. HEWITT: I don't know. I don't know what available treatment they have for persons serving regular sentences. Fort Worth used to be a Public Health facility. And in answer to Mr. Justice Blackmun's problem or question, Lexington is a Public Health facility, and to my knowledge while there may be a few prisoners serving sentences that are put there for administrative reasons, it is a Public Health facility and I

understand Title I's on the East Coast go to Lexington. We used to send Title I's on the West Coast to Fort Worth when it was a Public Health facility, but several years ago, when Fort Worth was transferred to the Bureau of Prisons, a California contract was made with Catholic Charities in San Diego for the commitment of Title I addicts. And I am frank to admit that our judges were not so anxious to use Title I to send them to San Diego to an outpatient type program, they haven't used it nearly as much as we used to. Now the judges would prefer using Title II, the prison type commitment.

Q If Marshall had got Title II treatment, would he be where he is now?

MR. HEWITT: No, Your Honor, he would probably be at Terminal Island. I don't believe there is a NARA program at McNeil.

Q Well, wouldn't you be making the same argument if there were no Title II program and Marshall was not getting treatment where he now is but other convicts at other places or even in this prison are getting treatment?

MR. HEWITT: I wouldn't be here arguing it because he wouldn't have a constitutional right to fair treatment, being a member of a class being discriminated against by this classification.

Q Well, he is among the class that is excluded from treatment and he is a member of the class that may deserve

treatment as much as the people who are getting treatment.

MR. HEWITT: And by some prison regulation he is being deprived of it?

Q No, they just had reached the limit of the program.

MR. HEWITT: Well, I think those are more reasonable problems that they might have in connection with who gets into a program by the exercise of discretion by the Bureau of Prisons or by the prison authorities. It may well be that had Congress vested with them the discretionary power to decide who is going to be in a program and who isn't on some qualitative basis, we would have a different problem. But here Marshall is kept out not on the basis of any rational determination by a court --

Q That is your position, I understand that.

MR. HEWITT: -- he is out of it only because this conclusion, this conclusive presumption that he is a dangerous, vicious criminal on the basis of two prior criminal, two prior felony convictions.

Q Did I understand you to say, Mr. Hewitt, that I and III may be pilot programs, but the legislative history does not indicate that they regard the program under Title II as a pilot one?

MR. HEWITT: As I read the legislative history, Your Honor, most of the comments were concerning civil commitments

under Titles I and II as being a novel approach to the problem, and that most of the conversation was in connection with this being something new, to defer prosecution and to permit an offender to go into a hospital rather than to be prosecuted. I don't think it is novel to put into the prison system a narcotic treatment program for addicts. This wasn't that revolutionary.

Title I was a deferred prosecution, an election by the offenders is now, it was novel and it was experimental.

Q And have we had a narcotics treatment program generally in the federal prison system before we ever got Title II?

MR. HEWITT: Certainly not to the extent. I think recent legislation has opened up the areas of providing treatment for addicts. Of course, I would hope that the prisons are trying to reach the root cause of every prisoner's problem; if it be addiction, I would hope they would give him some kind of treatment. Here I don't know what the differences are. They are more technical. But protection of society, I would urge upon the Court, is not the objective of the Narcotic Addict Rehabilitation Act. It may be a noble legislative purpose in other areas, but I don't think that the Solicitor General can rely upon protection of society to justify this classification.

The clear purpose of the Narcotic Addict Rehabilitation Act is to rehabilitate eligible addicts, and protection of

society simply has no part in that legislative scheme. We concede that excluding convicted felons may protect society, but certainly it doesn't further the purposes of this statute which is to rehabilitate addicts charged with an office.

Q Well, doesn't that though serve a social purpose and protect society in the long run, to rehabilitate addicts?

MR. HEWITT: Yes, Your Honor. I think that there is this ultimate purpose of protecting society by eliminating the addiction, but I don't think the purpose of this statute can be in any sense of the word to protect society by keeping convicted offenders out of the program, except indirectly by perhaps trying to rehabilitate more offenders.

What we are talking about here basically is a scheme that is designed to accomplish a certain objective, and an irrational classification that I think rather than furthering the objective certainly defeats a good portion of it. We are taking the position that this is almost a conclusive presumption that prevents the trial judge from exercising his discretion. It may well be that Marshall could be determined by the trial judge not suitable for treatment. Upon an examination of his background, the judge might determine that the felonies, the prior felonies were not drug related, they were violent felonies and show him to be a bad man and not give him the treatment. But he isn't escaping punishment if he is committed to prison for

addict treatment. He can be kept up to ten years, when he is paroled it is with the discretion of the board, I am sure they are not going to let him out until he is ready to go on the street, he goes into a Board of Parole supervised after-care program, he certainly is not escaping punishment. Those phrases in the legislative history are aimed more at Title I, and there is a great deal of confusion about conservation of available resources and so forth, civil commitment, as the term is thrown about -- this is not a civil commitment, it is a penal commitment, and this is not a novel program. It is a change in a concept of penal reform.

Q There are quite a number of statutes in the states, and I think there are some in the federal, which make it mandatory for a particular sentence after either one conviction or two convictions, that takes the discretion from the sentencing judge in the same way, does it not?

MR. HEWITT: It certainly does, Your Honor.

Q And in the federal system is there not a requirement that there be a five-year minimum after -- on the second conviction?

MR. HEWITT: Some offenses, yes, Your Honor.

Q Yes.

MR. HEWITT: But the purpose of that statute is to impose a harsh punishment on certain types of offenders, in that case drug pushers. It is reasonably related to that

purpose, the punishment. Here the object is not punishment, it is simply rehabilitation, and this exclusion does not accomplish that purpose.

Q Well, can't it be argued though that as the people in your client's position, the choice of Congress was to punish rather than to rehabilitate by excluding?

MR. HEWITT: If that is the purpose, Your Honor, then the classification should be set aside because it was not reasonably related to the purpose of this statute. Punishment is not the purpose.

Q Well, I think certainly the Solicitor General contends that so far as those who were excluded, the choice of Congress was in favor of punishment rather than rehabilitation.

MR. HEWITT: There is nothing in the legislative history or the stated purpose that would indicate there was any desire --

Q It seems to me that it is clear on the face of the statute, they excluded them from the treatment, from the program.

MR. HEWITT: In order to punish them?

Q Well, that is what would follow.

MR. HEWITT: Well, I think it is certainly beyond the stated purpose of the statute, and there is nothing to support any intention upon Congress to punish addicts because of their prior criminal record. Certainly they are being punished by

being deprived of addict treatment that other similarly situated would be entitled to, but I certainly don't think that this furthers any legitimate legislative objective, since this is not a penal statute imposing punishment for any offense. He is being punished indirectly. Everyone who is deprived of a constitutional right is being punished.

Q What is the purpose of the exclusion?

MR. HEWITT: I don't think it has any purpose, Your Honor, and that is why we are here.

Q Well, the United States says it does have a purpose --

MR. HEWITT: They say the purpose --

Q -- namely to --

MR. HEWITT: -- is to conserve available resources, to limit --

Q Also to leave this particular class to the ordinary processes of the criminal law --

MR. HEWITT: They can only find --

Q -- because this is a special class of defendant posing a greater hazard. That is what the government says. I am not saying whether I agree with it or not.

MR. HEWITT: But that cannot be justified when the purpose of this statute is the rehabilitation of offenders, because there is no rational relationship between punishment in the context of this statute and the rehabilitation of

narcotic addicts.

Q Mr. Hewitt, you have as a premise that these people are similarly situated but is a man with three or four felony convictions in the same situation as a person who has never had any prior convictions?

MR. HEWITT: But for that exclusion he would be, Your Honor. He would be a member of an eligible class but for the prior felonies.

Q Well, then we come back to the proposition of whether it is a reasonable classification for Congress to make I guess, don't we?

MR. HEWITT: Yes, Your Honor. And I say that it is not reasonable, the government says it is because it is related to a legitimate purpose of the statute in that it conserves available resources, and it is our position that that is not sufficient.

MR. CHIEF JUSTICE BURGER: Mr. Hewitt, you came here at our request, of our appointment to this Court, and we thank you for your assistance not only to your client but your assistance to the Court. Thank you.

MR. HEWITT: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 10:50 o'clock a.m., the case was submitted.]

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