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In the

Supreme Court of the United States

Warden Lewisburg Penitentiary,

Petitioner

v.

Benigno Marrero

73-831

Pages 1 thru 40

Washington, D. C.
April 29, 1974

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

WARDEN, LEWISBURG PENITENTIARY, Petitioner	:	
v.	:	No. 73-831
BENIGNO MARRERO	:	

Washington, D.C.

Monday, April 29, 1974

The above-entitled matter came on for argument at 10:17 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:

MRS. JEWEL S. LAFONTANT, Office of the Solicitor General, Department of Justice, Washington, D.C.
For Petitioner

JOHN WITMEYER III, ESQ., 20 Broad Street, New York, New York 10005
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 73-831, The Warden of Lewisburg Penitentiary against Marrero.

Mrs. LaFontant, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. JEWEL S. LAFONTANT

ON BEHALF OF PETITIONER

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

The issue in this case is whether the Respondent, Marrero, who was ineligible for parole at the time he was sentenced, may now be considered eligible for parole since he has served more than one-third of his sentence.

Now, the sentence he is serving was passed down under a law that has since been repealed. The law was repealed May 1st, 1971 and the repealing statute is called the "Comprehensive Drug Abuse Prevention and Control Act."

The Respondent was convicted by a jury in the United States District Court for the Southern District of New York on two counts of receiving, concealing, facilitating 141 grams of heroin and with purchasing, dispensing and distributing 194 grams of cocaine.

At the time of his conviction and sentence, people guilty of these violations were faced with a mandatory

penalty of five years, at least, in jail and under that statute that was in existence at that time, parole was not available, the parole that we see under 18 USC 4202.

Approximately one year before the passage of this new repealing statute, the Respondent was sentenced as a second offender and he received a sentence of ten years on each of two counts to run concurrently.

His conviction of May 27th, 1970 was affirmed by the Second Circuit Court of Appeals and this Court denied certiorari. Therefore, the Respondent is serving his sentence in the Federal Penitentiary at Lewisburg, Pennsylvania.

On February the 24th, 1972, a year and nine months after his sentence, Respondent filed a petition for habeas corpus in the United States District Court, the middle district of Pennsylvania. He alleged that the statute 26 USC 1737(D) that was in effect at the time of his sentencing and under which, as I said, he is ineligible for parole, was repealed. He should now be eligible for parole, having served more than a third of his sentence.

The District Court denied the habeas corpus petition on jurisdictional grounds but Judge Kneeland in the District Court opinion and by way of dictum said that the new statute did not repeal the prohibition on parole eligibility on the ground that the prohibition was a penalty preserved by the specific saving clauses of the provisions of Section 1103a

of the new act and under the general provision, saving provision of 1 U.S.C. Section 109.

The Court of Appeals for the Third Circuit reversed and granted Respondent's application for habeas corpus and directed that he be released within 60 days unless he was given hearing.

There is a conflict in the jurisdictions throughout this country and the court's mandate has been stayed by Mr. Justice Brennan's order pending this Court's determination.

Now, at this late date, after this case was set for argument, the Respondent, having served the Government with a memorandum attacking the stay of the mandate issued by Mr. Justice Brennan on October 25th, 1973, attempts to say that Mr. Justice Brennan's order was an abstract order and that Mr. Justice Brennan, therefore, did a useless act.

During the entire five and a half months since the mandate was issued, not once did the Respondent raise the ineffectiveness of the stay order. In fact, he recognized its validity because he attempted on two occasions to have it vacated, but on different grounds.

Everyone else recognized the validity of that mandate and behaved accordingly, including the District Court.

Respondent submits that Mr. Justice Brennan's order is useless because it doesn't contain some words that, evidently, the Respondent believes may be magic, some words

that Mr. Justice Harlan issued in the Panama Canal case when he stayed a mandate and those words were, "All further proceedings under the mandate be stayed."

We find no authority for such a construction. Mr. Justice Brennan's stay order, which is on page 14 of the Appendix, is as follows, and I'd like to read it to the Court.

"It is ordered that the mandate of the United States Court of Appeals for the Third Circuit in Case No. 72-1842 be and the same is hereby stayed pending the timely filing of a petition for writ of certiorari in the above-entitled cause.

"Should such a petition be so timely filed, this stay is to remain in effect pending this Court's action on the petition.

"If the petition for writ of certiorari is denied, this stay is to terminate automatically.

"In the event the petition for writ of certiorari is granted, this stay is to continue pending the sending down of the judgment of this Court."

QUESTION: Let's see if I understand it, Mrs. LaFontant, the Government's position is that after the word "mandate," there ought to be read in, in the circumstances of this case, "and all proceedings thereunder."

MRS. LAFONTANT: Yes, and --

QUESTION: And that is the gist and the whole of it, is it?

MRS. LAFONTANT: That is correct, Mr. Justice Brennan.

QUESTION: I gather, in fact, that he has not been released and he has not had a parole hearing. Is that correct?

MRS. LAFONTANT: That is correct.

QUESTION: And so he is still confined?

MRS. LAFONTANT: He is still incarcerated.

QUESTION: And the District Court has not suggested that there ought to be a parole hearing.

MRS. LAFONTANT: No, sir, not in any event.

QUESTION: Pending the decision here.

MRS. LAFONTANT: That is correct.

And so I say to you that, is it not clear -- I should ask, isn't it clear on the face of the stay order that the intent and the effect was to preserve the status quo of this case until a final determination was made. We cannot even respond and say that Respondent is urging form over substance because the form of this stay order is certainly more than adequate. But even if it were --

QUESTION: He urging form over form.

MRS. LAFONTANT: I'd say we will not say he can urge form over substance.

QUESTION: He is urging form over form, is your submission, Mrs. LaFontant.

MRS. LAFONTANT: Yes, your Honor. Yes, Mr. Justice Stewart.

QUESTION: The Respondent is still in the penitentiary, isn't he?

MRS. LAFONTANT: The Respondent is still at Lewisburg in the penitentiary.

QUESTION: Because a third of his sentence has not yet elapsed? Is that correct?

MRS. LAFONTANT: Yes, a third of his sentence has elapsed and he, in his habeas corpus petition, he has set that out, that he has served more than a third of the sentence that was given him, the ten years, and therefore that he is eligible for parole because of the new repealing statute.

QUESTION: And that is a question of his eligibility for parole. Has the parole board --

MRS. LAFONTANT. His consideration for eligibility, yes.

QUESTION: Right. Has the parole board done anything on this?

MRS. LAFONTANT: No, Mr. Justice Stewart.

QUESTION: Nothing at all. It is just a question of eligibility.

MRS. LAFONTANT: Everything has been stayed and

remained in status quo since his incarceration. But I'd like to even add that even at this date if the form had to be changed or if this Court felt that it should be changed, it is our position that this Court could stay the mandate anew, if it so wished.

Respondent further contends that the stay order is of no effect since it was entered after the Court of Appeals mandate issued. This, too, is without merit because this Court, in Carr versus Szasza and in Aetna Casualty and Surety Company versus Flowers, stated clearly that the fact of the mandate of the Circuit Court of Appeals has issued does not defeat this Court's jurisdiction.

Now, in discussing the basic issue concerning whether or not the Respondent is eligible for consideration for parole, I wish to refer briefly to the common law.

Under the common law, when a criminal statute is repealed by another statute or was amended so that there was a lesser punishment, the defendant could take advantage of that and he was entitled to the benefit of the new act unless a specific saving clause in the new law expressed legislative intent to the contrary or if the general savings statute contains such a provision.

Here, we not only have a specific saving clause in 1103(a) but we also have the general saving clause, Section 109 contained in 1 U.S.C. providing the prosecution

for any violation of law occurring prior to May 1st, '71 shall not be affected by the repeal of the former drug abuse statute.

In denying parole and probation consideration we are helped, I believe, a lot by the case of United States versus Bradley where the offender was sentenced after passage of the repealing act and where this Court held that the prohibition in the repealing statute of suspended sentences, probation and early parole survived the repeal of the 1956 Narcotic Control Act.

However, since none of the offenders in the Bradley case, none was eligible for consideration for parole because they hadn't even begun to start serving their sentence, the issue of whether or not Section 4202 was banned was not settled. It was only settled that Section 4208 was -- did not ban the earlier sentences or the earlier provisions of 1956 Drug Abuse Act.

We submit that the ban on Section 4202 parole, like the ban on Section 4208(a) parole, certainly survives the 1956 statute and what the Court has before it is a relatively straightforward question of legislative intent.

Ineligibility for consideration for parole is covered as part of the prosecutions of the offense referred to in the Act's saving clause and is part of the penalty for the prior crime included in the general savings statute and

and in Bradley, this Court ruled that the word "prosecution" in the saving clause was held to include sentencing at page 611 and rightly so and we submit that it also includes the word "penalty."

Now, the Respondent in his brief at page 4 and note 2, reference is made to the effect there that, unfortunately, the Respondent does not possess a crystal ball to know that the sentencing court intended for him to remain in jail for more than three and a half years.

What Respondent should possess, and certainly, what the sentencing court did possess, was knowledge that in sentencing Respondent for ten years, he would not be freed on parole before the mandatory release time.

When the judge entered the order and entered the sentence of ten years, that was not only part of the prosecution, that was part of the penalty and at that point in time, he knew that when he sentenced the Respondent to ten years, that the Respondent was not going to be eligible for consideration for parole --

QUESTION: He could have --

MRS. LAFONTANT: -- that the determination was made on the date of the sentence and of the judgment.

QUESTION: He could have sentenced Respondent to a longer term under the --

MRS. LAFONTANT: He could have sentenced, under

the violations at that time, he could have sentenced Respondent to 40 years, but he gave him ten years, two ten-year terms to run concurrently.

QUESTION: What discretion did he have in the way of sentencing him to a shorter term?

MRS. LAFONTANT: He had no discretion whatsoever because under the statute at that time it was mandatory, if he were a first offender, that you receive a five-year term.

If you were a second offender, it was mandatory that you be given a minimum of ten years but you could have been given a maximum of 40 years. He was given --

QUESTION: And this was a second offender?

MRS. LAFONTANT: The Respondent here was a second offender.

QUESTION: And there were two counts or one?

MRS. LAFONTANT: Two counts, one of -- as I indicated, of concealing and facilitating the heroin. The second count dealt with 194 grams of cocaine.

QUESTION: So is it correct to say that the judge imposed the minimum permissible sentence?

MRS. LAFONTANT: Yes, it would be correct to say that.

QUESTION: So it doesn't make any difference what the judge might have wished to have given less than that, does it, if he didn't have power to do it?

MRS. LAFONTANT: I don't think we -- I am not that concerned about what he may have wished. I do believe we can't say what he might have wished to have done. All I am saying is that, when he gave him ten years, he knew very definitely that he was not eligible for parole, also.

QUESTION: Well, the point of my question was, even had the judge, perhaps, wished to give him less than a ten-year sentence --

MRS. LAFONTANT: He was not free to do so.

QUESTION: -- he was not free to do so or even had the judge wished to make him eligible for parole in less than a ten-year period, he was not free to do so.

MRS. LAFONTANT: He was bound by the law --

QUESTION: At the time of the sentencing.

MRS. LAFONTANT: -- at the time of the sentencing.

QUESTION: Right.

MRS. LAFONTANT: As we contend we are still bound by the law, no matter what the individual wish of the particular judge or respondent might be.

QUESTION: Mrs. Lafontant, if -- as I think I understand you -- this ties into the original sentence, do we have a jurisdictional problem here of this habeas application was filed in the district of incarceration, not in the original sentencing court. Does this make a difference?

MRS. LAFONTANT: We feel that it makes no

difference in this case, that he is properly before the Court in the habeas corpus petition.

QUESTION: Even though, on your theory, he is attacking the original sentence?

MRS. LAFONTANT: And he is incarcerated in Pennsylvania.

QUESTION: Well, true enough, but I think that hasn't -- that last fact has not prevailed in some of our jurisdictional controversies here before.

MRS. LAFONTANT: The Government's position is that he is properly before the Court and we have not pushed that position but have gotten, really, to the merits of the case in this instance.

QUESTION: But if it is a question of jurisdiction, I suppose we can't avoid it here.

MRS. LAFONTANT: This Court, yes, your Honor.

Now, the general saving statute in Title I which dates from 1871, it provides in very broad terms that the repeal of any statute shall not have the effect to release any penalty, forfeiture or liability incurred under such statute unless the repealing act expressly so provides.

Now, there has been a considerable amount of discussion in the briefs concerning the words "penalty, liability, and forfeiture," but in the Reisinger case in 1888 which considered that question, the Court applied the

statute to the criminal case where the statute has actually been repealed before the indictment was returned and the repealing statute itself, just as in our case, had its own savings clause, except it was much narrower. It applied only by terms to saving prosecutions that have already been commenced at the time of the repealer.

In the Reisinger case, it not only said that the general savings statute with the narrower clause prevailed, but said it could not be construed as being in conflict with the narrower statute and they went further and said that the words that we have been talking about, "penalty, forfeiture, liability," were intended to be synonymous with the word "punishment."

We take the position that this consideration or this denial of consideration for eligibility for parole is punishment or penalty which automatically attach upon conviction. It is part of the sentence. It is part of the prosecution and that the saving statute of Section 109 and the specific saving statute of 1103 prevent the offender from being considered for parole eligibility.

This analysis is confirmed by the legislative history which is covered, I think very thoroughly, in our brief. That is the legislative history of the Narcotics Control Act of 1956.

That history has expressed a strong Congressional

intent to punish narcotics pushers severely, in part by eliminating parole as an element in punishment and this was part of the penalty, the trafficking in narcotics.

At the 91st Congress, in Volume 116 of the Congressional Record, at page 33650, Congressman Anderson of California said -- and I'd like to quote him -- "When an individual encourages another to take drugs and when an individual sells drugs to another, he is torturing that person and ruining that person's life and we should have no sympathy for him.

"The penalty for the pusher should be equal to the misery he causes his fellow man."

The new statute substantially revised the elements of the narcotics offenses and the applicable penalty provisions and its general philosophy was summarized by Congressman Gramo in the same Congressional Record only at 33616 when he said, "The new Bill expertly combines the weapons of law enforcement, rehabilitation and research for a massive attack on the drug abuse problem in the United States. By supporting this legislation, we will give our law enforcement officials the tools they need to crack down on the organized criminals and pushers who profit from agony and death."

QUESTION: Mrs. LaFontant, did the '70 Act repeal the '56 Act in toto?

MRS. LAFONTANT: Yes.

QUESTION: It wasn't just the penalty provisions that were repealed?

MRS. LAFONTANT: That is correct, Mr. Justice Rehnquist. It was a complete new act. It is a much broader act because the 1956 statute dealt only with narcotics. It didn't deal with the general barbituates and amphetamines and that sort of thing.

QUESTION: But I think where it is part of a continuing criminal enterprise, doesn't 848, under the '70 act?

MRS. LAFONTANT: Yes.

QUESTION: So it didn't repeal everything. At least, it saved that much, did it not?

MRS. LAFONTANT: Yes. And I was getting to --

QUESTION: There is a prohibition against --

MRS. LAFONTANT: Yes, that is correct. I am getting to Section 848 to explain how that fits in and ties in with Congress' intent to severely punish the pusher.

QUESTION: But 848 was a new provision in the '70 Act, wasn't it?

MRS. LAFONTANT: Well, it really was the -- it's a new provision in the '70 Act but in a sense it has retained a lot of the old act because the punishment there is still -- in fact, the punishment under Section 848 is much more severe because in Section 848 the penalty is raised for the

first offender from five years to ten years and the outer limits are raised, as I recall, to life imprisonment, rather than the other.

So Congressman Giaimo, his last sentence is, "Yet at the same time we will recognize the fact that those who are addicted to drugs are innocent victims who must be helped and not punished."

Under the old law, ineligibility for parole only covered offenders involved in selling or otherwise transferring narcotics and did not apply to the possessors or to the individual abusers.

Now, the new act is still consistent with Section 7237(d) in retaining the punitive approach for the pusher in illegal drugs. This is demonstrated by the fact that the ban on suspended sentences, probation and parole has been continued for persons who engage in "a continuing criminal enterprise," although the Amicus brief at page 6 claims that the Government really realized the harshness of 848 and therefore, hasn't brought any indictments under that section. That brief is in error. The Government has filed several prosecutions, one of which has reached appellate level and that case is United States versus Manfredi at 488 Fed 2nd 588, where the convictions were sustained and the constitutionality of Section 848 upheld.

It is true that there is a new flexibility in the

1971 Act but there is no indication that that flexibility was to have retroactive effect.

Despite the premise of Petitioner's argument that the action taken by Congress in repealing Section 237(d) and allowing discretion as to probation and parole for some narcotics offenders was not primarily an expression of a desire for leniency. The reason was really much more pragmatic.

The stated goal was much more pragmatic. They wanted to make sure that people who were pushers were convicted, were prosecuted and convicted and what they have found is that in many jurisdictions the prosecutors were timid about bringing cases where the penalty was severe and maybe the trafficking not as great as it was in the Respondent's case, but also the fact that the jurors often did not wish to give such a severe sentence so, therefore, several guilty people or people we might have wanted to prosecute were not prosecuted.

So they wanted to make sure that the pusher was prosecuted and convicted.

It is also evident from the terms of the Congressional intent, as shown, that the no-parole position is a penalty from the viewpoint of the convicted defendant.

His penalty is very substantially released if he is paroled into society and is no longer incarcerated behind

steel bars.

A convicted prisoner who has been paroled undoubtedly also believes that the parole constitutes a most substantial release from penalty. I think we'd be hard-pressed to find any convict who did not view the unavailability of his parole as a penalty.

The Sixth Circuit stated the viewpoint correctly in Harris versus United States at 426 Fed 2nd, page 100 when it said, "It may be legislative grace for Congress to provide for parole, but when it expressly removes all hope of parole, this is in the nature of an additional penalty."

Under both the old act and the new act, Petitioner's conduct was criminal and even though there were legislative changes made, it is our submission to this Court that the old act was not repealed. We submit that the Court of Appeals was in error when it reached the result in holding that violations of the pre-May 1st, 1971 drug laws are not to be punished under the pre-May 1st statute.

Our position is that at the time the crime was committed, the law in effect controlled, that Section 1103(a) forecloses consideration for parole eligibility under Section 4202, just as it does in 4208 and the general savings statute of Section 109 clearly mandates that availability of parole is foreclosed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Witmeyer.

ORAL ARGUMENT OF JOHN J. WITMEYER III, ESQ.,

ON BEHALF OF RESPONDENT

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

Having heard the Government's argument, I believe it is appropriate for us to step back for a moment and take a fresh look at the question that confronts this Court today and that question is, whether the Federal Government can presently deny Mr. Marrero parole considerations under Section 4202 of Title 18, despite the fact that the only bar to parole eligibility was expressly repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, simply because Mr. Marrero was convicted of a pre-repeal offense.

But if the question is stated in another fashion, I believe that whether penal authorities can deny the 800 prisoners in Mr. Marrero's position elgibility for participation in important rehabilitative programs provided through parole, even though there is no rational purpose to be served by that denial and in answering these questions, there are, I believe, three inquiries that should be made.

First, did the 1970 Drug Control Act mark a rejection by the Congress of its earlier approach to the

drug problem in this country? And did it represent a decision that an effective program of rehabilitation was essential if drug abuse were to be controlled?

Second, would considering Mr. Marrero eligible for parole effecuate that Congressional decision without at the same time creating any difficult administrative problems?

And, third, does the language of the four applicable statutes allow Mr. Marrero to be considered for parole?

Let us consider first the first question. What did the 1970 Act signify as to Congress' plan for the drug problem in the United States? And I believe the answer to that question is readily apparent from the history of the drug problem in this country and Congress's response to it.

I think we all know that Congress first attacked the drug problem in the early 1900's because of the widespread drug abuse of the 19th century but for the purposes of this case, perhaps the most important legislation was the Narcotic Control Act of 1956, the statute under which Mr. Marrero was convicted and in 1956 Congress reviewed the then-growing drug problem in this country and it concluded it should take a very harsh approach.

It adopted a system of mandatory minimum sentences without possibility of parole and it decided that severity was the key to solving the drug problem. But as we

all know, 14 years under the 1956 legislation saw the drug problem in this country grow to alarming proportions and it was obvious that the 1956 approach simply did not work.

The 1960's saw the Federal Government begin a review of what had happened with its prior efforts to control this problem. There were many studies undertaken, both within and without the Government, including those of two Presidential Commissions, the Prettyman Commission and the Katzenbach Commission and the conclusion of those commissions and of many others was that rehabilitation was essential to solve the drug problem and Congress slowly began to change its approach.

For example, in 1966, it adopted a Narcotic Addict Rehabilitation Act to provide a method of treating and rehabilitating narcotics addicts.

In 1968, for example, it amended the Community Mental Health Center legislation to include treatment for narcotics addicts in mental health centers and in 1970, Congress embarked upon a comprehensive revision of the drug laws of this country.

Congress had before it evidence of the need for rehabilitation and for ameliorating the harsh penalties that had been inflicted under prior law in order that the law would better fit the crime and Congress also recognized that under prior law, prosecutors had become reluctant to

prosecute and judges and juries had become reluctant to convict.

Now, these important facts, facts which the Government argues show that in 1970, Congress merely intended to amend the law to make it easier to put more people in jail, these facts actually show something much different.

They show a public consensus, including that of the judicial process in this country, that the 1956 approach was not the solution to the problem. They represented public rejection of the harsh, retributive approach and it was a consensus so strong that I believe respect for law in this country began to suffer as the judicial process became unwilling to enforce the law and the 1970 Act was in response to all of these facts.

And that was not an Act that merely amended the Criminal Provisions Law because it also directed the development of treatment centers and of rehabilitative programs and it directed further studies undertaken into the drug problem and at about the same time, Congress enacted the Drug Abuse Education Act of 1970 and the Comprehensive Alcoholism and Alcohol Abuse Act of 1970, all of which, when taken together, show a complete reform of federal legislation and the federal approach to the drug problems in this country and the repeal of the bar to parole shows that parole was to be an important rehabilitative tool in implementing the new Congressional

approach.

Now, Congress' determination that rehabilitation was essential to solving the drug problem is further reflected by the Drug Abuse Office and Treatment Act of 1972 and that Act contains a specific Congressional finding that the success of federal drug abuse programs and activities requires a recognition that education, treatment, rehabilitation, research, training and law enforcement efforts are all interrelated.

And I think the answer to the first inquiry, then, is Congress in 1970 did reject its old approach because harsh sentences reluctantly imposed were now to be replaced by a vigorous federal program founded upon rehabilitation.

The next question, then, is how would considering the 800 prisoners in Mr. Marrero's position fit into this new Congressional approach? And the answer is clear that it would help effectuate it.

As this Court has already recognized in Morrisey against Brewer, parole is one of the most important rehabilitative tools in our federal penal system and rehabilitation is the underlying objective of the 1970 Act.

Considering Mr. Marrero for parole effectuates that intention and poses no problems because the parole board has already stated in this case that it can easily handle the

800 applications of prisoners in Mr. Marrero's position.

In fact, the parole board routinely handles many more applications than that.

The board has also stated that no one would be released on parole unless the board felt that both the needs of society and of the individual prisoner would be served by doing so.

Simply stated, then, parole eligibility for Mr. Marrero both effectuates Congress' new plan for solving the drug abuse problem in this country and would, according to the parole board, benefit society generally and it would also place no burden whatsoever on the federal courts because prior criminal proceedings would not be reopening and judicial determinations are not required to implement parole under Section 4202.

I think, then, the answer to the second inquiry is that parole is consistent with Congress' plan for solving the drug problem and no rational purpose would be served by denying Mr. Marrero parole considerations.

This, then, brings us to the technical, statutory interpretation question posed by this case and I agree that this case is principally one of statutory interpretation.

Parole in the federal system is made available by Section 4202 of Title 18. Under prior law, Section 7237(d) of the Internal Revenue Code stated that 4202 could not be

applied to certain prisoners and 7237(d) was specifically repealed in 1970 by the 1970 Drug Control Act.

The statutory interpretation question is whether that repeal was rendered ineffective as to prisoners convicted under prior law because of two savings statutes, Section 1103 of the 1970 Act and Section 109 of Title 1.

The correct answer, I believe, is that the -- those statutes do not preclude parole eligibility. In fact, if this Court were to conclude otherwise, since no rational purpose would be served by denying parole to the 800 persons in Mr. Marrero's position, then if this Court held parole was unavailable, it would be required to confront constitutional questions.

Since there is no rational purpose to be served, would not a denial of parole contravene equal protection guarantees to the Fifth Amendment? Or as the California Supreme Court held last month in the case of In Re Foss, is not denying parole to drug offenders a violation to the Eighth Amendment to the United States Constitution in that it constitutes cruel and unusual punishment?

But I think an analysis of the saving statutes shows that these constitutional questions need never be reached because those statutes, when correctly construed, do not preclude parole.

First, of course, the operation of the two

savings statutes must be evaluated in the light of Congress' overall plan in 1970 for solving the drug problem and in accordance with a well-established rule of statutory construction that statutes must always be construed to effectuate remedial objectives.

The first statute, then, is Section 1103 of the 1970 Act and that was a statute designed to save prosecutions for violations of prior law and nothing more.

Now, this Court has already construed Section 1103 last term in the case of Bradley against the United States and there this Court said that the word "prosecution" as used in 1103 is to be defined by its ordinary legal usage and I think, as is clear from this Court's decision in Morrissey against Brewer, the parole process is not part of a prosecution in the ordinary legal sense but in Bradley this Court was confronted with the question of where Congress intended to draw the line in not changing the operation of prior law and it concluded that the word "prosecution" as used in Section 1103 precluded a trial court from granting probation or from accelerating a parole eligibility date but this Court specifically pointed out that parole under 4202 was a very different thing and Respondent submits that those differences require that Mr. Marrero be considered eligible for parole.

QUESTION: Do you think that our decision in

Bradley about the factors considered there raises the same sort of constitutional questions that you say would be raised by a denial of parole eligibility here?

MR. WITMEYER: Well, your Honor, I believe the similar questions are raised except there was a rational purpose to be served by the construction adopted by this Court in Bradley because I believe it was rational to conclude that Congress did not intend that the 1970 Act either reopen prior criminal proceedings or that it would treat unequally persons convicted of violations of prior law.

And if either of those -- or if this Court had allowed a trial court to place a prisoner on probation or had allowed a trial court to decide whether to accelerate his parole eligibility date, then either prisoners convicted of violating prior law would have had their eligibility for probation or the question of whether their parole eligibility date could be accelerated turn on a fortuitous circumstance, whether or not they were sentenced before or after May 1, 1971.

But the alternative would have been for all prior criminal proceedings to have been reopened, not only placing an undue burden on the courts but also, in the face of the probation statute and the statute allowing acceleration of parole which states that those determinations must be made at the time of sentencing.

I think that those reasons gave a rational justification for this Court's interpretation in Bradley but none of those reasons is present here today in a case involving Section 4202.

Parole under 4202 simply creates no administrative problems whatsoever.

QUESTION: In Bradley, I take it the Court looked on ineligibility for parole as part of the sentence.

MR. WITMEYER: No, your Honor, I think not. The question in Bradley was Section 4208 and that concerns a trial court's acceleration of the parole eligibility date.

QUESTION: Well, the trial court's acceleration of it was -- under Bradley, the trial court could not do that.

MR. WITMEYER: That is correct, your Honor.

QUESTION: So he could not interfere with the ineligibility for parole under the existing --

MR. WITMEYER: Well, he could not exercise his discretion that was granted to him under Section 4202 --

QUESTION: Well, I am just saying the reason the trial court didn't have this power was because under the prior law he didn't have that power.

MR. WITMEYER: Yes, Your Honor, that is correct.

QUESTION: And he didn't have power to interfere with any eligibility of parole or to grant eligibility for

parole where it wasn't present before.

MR. WITMEYER: Well, I think that mischaracterizes the parole process, you Honor. Under 4208 the trial judge can accelerate the parole eligibility date but parole itself is granted by Section 4202 and --

QUESTION: Well, I understand that but the prior law with respect to parole was held to apply in Bradley.

MR. WITMEYER: Your Honor, I believe what this Court said was, those decisions of the trial court which were made at the time of sentencing and therefore were essentially part of the sentencing process were caught by the word "prosecution" as used in 1103.

QUESTION: And his ineligibility for parole was part of that and the trial court couldn't interfere with it.

MR. WITMEYER: Your Honor, again, I think now because what this Court said was, the trial court could not --

QUESTION: Well, I agree with you that it said it was leaving the question open.

MR. WITMEYER: Yes.

QUESTION: But I couldn't be right -- I couldn't be wholly right.

MR. WITMEYER: Well, your Honor, I think perhaps the problem is that the Government's argument and the argument your Honor is directing himself to is that the word "prosecution" may preclude parole because the date of parole

eligibility depends on the length of sentence and sentences set by a trial court and I guess that would be the essence of the Government's argument as to what prosecution catches parole ineligibility.

But I think the relationship of parole under 4202, his sentence is only incidental. It exists only because Congress elected to use the length of sentence as one of the criteria determining whether a prisoner should be released on parole. I believe that eligibility for parole itself is a creature of statute created by the Congress. Parole is determined by an administrative body and whether one is eligible for parole is a question only of a person's status. Under the laws of the United States it does not involve an exercise of judicial discretion by a trial court in making any specific determination.

I believe, then, the fact is that the word "prosecution" does not preclude parole eligibility and that Section 7237(d) is not saved by 1103 and that conclusion effectuates the rehabilitative purpose intended by Congress in enacting the --

QUESTION: On this rehabilitative purpose, is this a pusher or an addict?

MR. WITMEYER: Your Honor, I --

QUESTION: I can't find it in the record.

MR. WITMEYER: It is not in the record.

QUESTION: It is not in there. Where is it?

MR. WITMEYER: I do not know. I think the Government, however, in stating the 1970 law intended to punish pushers and to continue the punitive approach, mischaracterizes what Congress intended.

QUESTION: So I understand you'd make the same, if he was a plain pusher, you'd make the same argument?

MR. WITMEYER: Yes, your Honor, because Congress -- the Government's argument with respect to Congressional intent rests largely on Section 848.

QUESTION: How do you rehabilitate a pusher?

MR. WITMEYER: Your Honor? I'm sorry?

QUESTION: How do you rehabilitate a pusher?

MR. WITMEYER: Your Honor, the penal authorities have many programs including those of parole where prisoners are placed in supervised environments, are given jobs, are given training. The parole board is the board which evaluates whether these programs would be effective in adapting a prisoner to fit back into society.

Now, I'm not going to infringe my view on their judgment because I have never been involved in the parole process. But I think it is recognized as principle of penology that mose prisoners can be rehabilitated if they are placed in the proper environment to do so and the parole board is one of the important mechanisms for accomplishing

that.

QUESTION: Well, is this latest act aimed at rehabilitating pushers?

MR. WITMEYER: Your Honor, I think it is.

QUESTION: As I read it, it is rehabilitating addicts. Am I wrong?

MR. WITMEYER: Your Honor, it is very hard to say what the word "pusher" means. The only case --

QUESTION: A pusher is a man that sells dope who does not use dope.

MR. WITMEYER: Well, then, I think the statute clearly intends that many of them be rehabilitated, your Honor, because the statute --

QUESTION: I thought it was addicts.

MR. WITMEYER: It is aimed at addicts and users and I think also pushers unless they are in a supervisory position over more than five persons.

QUESTION: Now, where in there can you show me anything about pushers?

MR. WITMEYER: Your Honor, the only thing in the statute --

QUESTION: Well, you said it is there. Where?

MR. WITMEYER: It is by virtue of Section 848 which bars parole in one very limited instance, namely, a person who supervises five or more others in the sale of drugs

and derives substantial income from them.

QUESTION: Other persons?

MR. WITMEYER: Yes, your Honor, that is correct.

QUESTION: And you said that that shows that it was made to rehabilitate pushers.

MR. WITMEYER: It was made to rehabilitate the individual who sells drugs, either because he is a user or because he is an addict or because he is impoverished and he is selling to a small group of people and he is the kind of person whom hopefully society can salvage and make a useful person again, yes, your Honor.

QUESTION: Was this man in that category? He sold quite a bit.

MR. WITMEYER: Your Honor, I don't know. There are no facts in the record on this case and I am not familiar with Mr. Marrero personally to be able to find out.

QUESTION: I read it someplace in this case.

MR. WIMEYER: He was apprehended, according to the Second Circuit opinion, on a roof of a building in West Harlem, New York in which they found drugs and he was the owner of the apartment. Beyond that, I don't know specifically what he has ever done.

QUESTION: Sometimes it is reflected by his prior conviction. That sheds some light, doesn't it?

MR. WITMEYER: He was convicted in one other

instance of possessing drugs, yes, your Honor. It doesn't say whether he is a user or an addict or a pusher. I really don't know.

QUESTION: But the quantities give some bite to --

MR. WITMEYER: That he probably was selling them, yes, your Honor.

Your Honor, I think the one remaining question facing us then today is Section 109 of Title 1 which is the general federal saving statute but I think before considering the operation of Section 109, it is necessary to determine whether it should be applied at all in this case and I believe the answer is, 109 should not be applied for two reasons.

First, Section 109, originally enacted in 1871, was intended only to obviate the need for including a specific savings clause in every repealing statute in order to preclude what are called "common law technical abatements."

I think it is evident from the history of the 1871 Act that that act was not intended to substantially change the law or to erect substantial impediments to effectuating remedial statutes and in this case, the 1970 Drug Control Act has its own savings clause, Section 1103, and 1103 is specifically limited to prosecutions and nothing more and 1103 encompasses all violations of prior law.

If 109 covers more than 1103, then these two statutes are clearly in conflict and 1103, as the latest

expression of the legislative rule, should prevail.

Second, allowing parole eligibility is not the consequence of a technical abatement, as the term was used at common law.

And since, I believe, the purpose of 109 is to prevent technical abatements, applying 109 to preclude parole eligibility would not effectuate its purpose and for these reasons, 109 should not be applied at all.

But even if this Court does decide to reach the question of the actual operation of 109, the conclusion still is that it does not preclude parole eligibility.

The effect of Section 109 in this case depends upon the meaning of two words used in that statute. One is "prosecution." The other is "penalty."

Since "prosecution" as used in Section 1103 does not preclude parole, then as used in 109, it should not do so either.

The question, then, is the meaning of the word "penalty" as used in 109 and I believe there are three reasons why the term "penalty" does not bar parole.

First, Section 109 is written in two parallel clauses. One refers to sustaining prosecutions and the other to releasing or extinguishing penalties.

These two clauses were clearly written in parallel and therefore should be construed consistent with

each other, each thus saving the same kinds of things.

If prosecution does not bar parole, then neither does penalty.

Second, in a criminal case, as five circuits have already decided, I believe, the word "penalty" as used in 109 should be interpreted to mean the imposed sentence of the trial court. But parole under 4202 is not a part of sentence and release on parole would not even affect an imposed sentence and consequently, for that reason also, the term "penalty" should not bar parole.

And, third, if the word "penalty" bars parole, then that same word picks up numerous other collateral restraints imposed upon convicts under federal law and no practical purpose would be served by requiring Congress to include language excepting amendments to any of those statutes from the effect of 109.

The answer to the third inquiry, then, I think is that the language of the applicable statutes permits parole eligibility and the conclusion is, then, that the technical and, I believe, purposeless construction urged by the Government ought to be rejected because Congress has now designed a comprehensive plan for attacking the drug problem in the country and rehabilitative programs are the corner-stones of the Congressional plan.

Considering Mr. Marrero and the 800 other

prisoners in his position, eligible for participation in the important rehabilitative programs that parole provides, helps effectuate Congress' plan for solving the drug problem in this country and there is simply no justification for abandoning these 800 prisoners, for condemning them to serve their terms without access to important rehabilitative programs and for frustrating the basic purpose of the 1970 Act.

For this Court to exclude Mr. Marrero from parole consideration would be for it to adopt a vindictive approach to the drug problem, an approach which Congress has rejected and which cannot be justified.

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

Do you have anything further, Mrs. Lafontant?

REBUTTAL ARGUMENT OF MRS. JEWEL S. LAFONTANT

MRS. LAFONTANT: Thank you.

Mr. Chief Justice and may it please the Court:

I'd like to respond briefly to Mr. Justice Marshall's question as to whether or not the Respondent is considered a pusher or whether he was an addict.

From the record it is shown that he was not an addict because he attempted to obtain sentence under NARA, the Narcotics Addiction Rehabilitation Act and he was denied that because there was no proof that he was an addict.

He came to the judge and said, I'm an addict and

I want to be sentenced under NARA but that was denied so there was no proof that he was an addict.

In addition, at the trial level, there was some evidence introduced that the Respondent's apartment was used to cut the dope into whatever size was necessary and that several others would come there to get their share and that dope was sold.

There is no proof in the record at all that the Respondent was an addict, although he asked for treatment under NARA and that was denied.

Also, as to the statistics about 800 or more inmates. There are only 489 inmates presently incarcerated who have served one-third of their term. We have a total of 734, however, who are in custody under the old act, but only 489 have served a third of their term.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Thank you, Mr. Witmeyer.

The case is submitted.

[Whereupon, at 11:12 o'clock a.m., the case was submitted.]