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CONNECTICUT BOARD OF PARDONS
ET AL.,

Petitioners,

v.

DAVID DUMSCHAT ET AL.

No. 79-1997

DAVID DUMSCHAT ET AL.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:50 o'clock a.m.

APPEARANCES:

STEPHEN J. O'NEILL, ESQ., Assistant Attorney General
of Connecticut, 340 Capitol Avenue, Hartford,
Connecticut 06106; on behalf of the Petitioners.

STEPHEN WIZNER, ESQ., Jerome N. Frank Legal Services
Organization, 127 Wall Street, New Haven, Connecti-
cut 06520; on behalf of the Respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

STEPHEN J. O'NEILL, ESQ.,
on behalf of the Petitioners

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STEPHEN WIZNER, ESQ.,
on behalf of the Respondents

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COTTON CONTENT

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments now in Connecticut Board of Pardons v. Dumschat.

Mr. O'Neill, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF STEPHEN J. O'NEILL, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. O'NEILL: Mr. Chief Justice, and may it please the Court:

The issue in this case is, has the practice of the Connecticut Board of Pardons in granting relief to inmates serving what we call straight life sentences in Connecticut -- that is, sentences with no court-imposed minimum term -- and relief to the extent that the minimum term set by statute is reduced, thereby accelerating the inmates' eligibility to appear before the Connecticut Board of Parole, giving inmates serving such sentences a due process right to the extent that the Board of Pardons must give written explanations of adverse decisions when they deny such relief.

This is the second occasion upon which we have come to this Court, the parties in this case have come to this Court on the issue of what, if any, kind of a written statement is required when the Board of Pardons denies pardon relief to a so-called lifer in Connecticut.

The first occasion followed a decision in January

1 of 1979 by a panel of the 2nd Circuit which analogized pardons
2 to parole, and held in part that written statements of
3 reasons for denial of parole are part of the due process re-
4 quirements surrounding parole decisions, this holding was based
5 upon the expectation of inmates in regard to parole possi-
6 bilities which lead to those inmates acquiring some liberty
7 interest in the parole process.

8 In May of 1979 this Court decided Greenholtz. We
9 had petitioned for a writ of certiorari on the January, '79,
10 decision of the 2nd Circuit. In June of 1979 this Court
11 granted our petition and remanded the case to the 2nd Circuit
12 for further consideration in light of this Court's decision
13 in Greenholtz. The same panel of the 2nd Circuit, the same
14 three judges, reconsidered the matter. Parties briefed it by
15 order of the 2nd Circuit but there was no oral argument.
16 Although concluding that the applicable Connecticut statute,
17 Section 18-26 of the Connecticut General Statutes, offered
18 only the mere hope of pardon, that it does not create a legi-
19 timate expectation of freedom, and hence does not implicate
20 due process -- and in this regard the panel concluded that
21 Section 18-26 contains neither a presumption in favor of
22 pardon nor a list of factors to be considered by the Board of
23 Pardons, and in fact that the statute gave the Board unfet-
24 tered discretion.

25 Despite these conclusions, the court upon

1 reconsideration, affirmed its earlier conclusion, as the
2 consistent issuance of pardons to inmates serving so-called
3 straight life sentences in Connecticut has given inmates serv-
4 ing such sentences a protected liberty interest in the
5 pardons process.

6 QUESTION: When you say, "consistent issuance
7 of pardons," Mr. O'Neill, the testimony was, what, 75, 85,
8 90 percent? It was not straight across the board?

9 MR. O'NEILL: That's correct, Mr. Justice Rehnquist.

10 QUESTION: What was the average time, Mr. O'Neill?

11 MR. O'NEILL: The average time?

12 QUESTION: Of service?

13 MR. O'NEILL: The testimony on average time came from
14 the same witness who testified on the percentage of pardons, Mr.
15 Gates, who was then Chairman of the Connecticut Board of
16 Parole. His testimony was somewhere between 14 and 17 years.

17 QUESTION: For about 75 percent, is it, of those
18 sentenced under these sentences?

19 MR. O'NEILL: I think the fairest statement of the
20 testimony is that it's somewhat more than 75 percent, I think
21 is the fairest --

22 QUESTION: In that sense, there was a pattern,
23 was there?

24 MR. O'NEILL: In that sense --

25 QUESTION: Of parole within 14 to 17 years?

1 MR. O'NEILL: Pardon, Your Honor.

2 QUESTION: Pardon, within 14 to 17 years.

3 MR. O'NEILL: Within 14 to 17 years. And that was
4 Mr. Gates' approximation. It was not based on any study of
5 his records or the Board of Pardons' records.

6 QUESTION: Well, may I ask, may we accept that as
7 what the practice has been?

8 MR. O'NEILL: Well, following the -- Mr. Gates is
9 a very knowledgeable man and he has been around in the cor-
10 rections area in Connecticut for decades -- following the
11 decision of the 2nd Circuit and before this Court granted
12 certiorari, we did embark upon a process of reviewing the
13 minutes of the Board's meetings for the past five or six
14 years, I believe, to see if we could put together some kind
15 of a pattern, but we really didn't get all that deeply into
16 it when this Court granted certiorari, and we stopped.
17 One thing that interested me in that search is that I don't
18 know that all inmates serving life sentences apply for
19 pardons. We get frequent applications from the same inmate,
20 but I wonder if all inmates serving life sentences do in fact
21 apply for pardon, really. But anyway, that's not in the
22 record up to this point, Your Honor.

23 Following the ordering of the filing of the records,
24 as the Court has indicated, the 2nd Circuit remanded to the
25 district court to determine how many years a lifer must serve

1 before the probability of a pardon becomes so significant as
2 to give rise to a protected liberty interest. The finding
3 or conclusion of the 2nd Circuit that the consistent issuance
4 of pardons -- again, from the facts in the record, somewhere
5 around 75 percent -- and it's also referred to as the
6 regularity of their issuance -- is again, as I indicated,
7 based on the testimony of Mr. Gates.

8 In Board of Regents v. Roth, relied upon by the
9 majority of this Court in Greenholtz, this Court held in
10 part that the Fourteenth Amendment's procedural protection of
11 property is the safeguard of the security of interest that a
12 person has already acquired in specific benefits.

13 It further held that to have a property interest in
14 a benefit a person clearly must have more than an abstract
15 need or desire for it, he must have more than a unilateral
16 expectation of it, he must instead have a legitimate claim of
17 entitlement to it. It is a purpose of the ancient institu-
18 tion of property to protect those claims upon which people
19 rely in their daily lives, reliance that must not be arbi-
20 trarily undermined.

21 In the Leis case, Leis v. Flynt, this Court further
22 held that a claim of entitlement under state law to be
23 enforceable must be derived from statute or legal rule or
24 through a mutually explicit understanding. There simply is
25 no statute, legal rule, for a mutually explicit understanding

1 such that lifers in Connecticut have a protected or a legiti-
2 mate claim of entitlement to pardon relief.

3 In Roth itself there was at least a suggestion that
4 most of the teachers hired on a yearly basis were in fact
5 rehired, and yet that suggestion was not deemed significant
6 enough to give the teacher a legitimate claim of entitlement,
7 thus invoking due process. Indeed, in Greenholtz itself, in
8 the dissenting opinions, there was detailed reference to
9 parole statistics around the country which showed, in part:
10 that the history of New York was that 75 percent of persons
11 eligible for parole were in fact paroled, and that the figure
12 went as high as 92 percent in other states around the country;
13 that the figures nationally show that some 70 percent of
14 inmates released to the community were in fact released to
15 the community via the parole process. And yet, the majority
16 of this Court held that there was no legitimate claim of
17 entitlement.

18 Indeed, even other panels of the 2nd Circuit have
19 in Pugliese and Boothe acknowledged that high percentages of
20 parole releases do not give somebody a legitimate claim of
21 entitlement. I seem to be the only attorney who has lost
22 this issue, at least in the 2nd Circuit.

23 In short, even if the Connecticut Board of Pardons
24 may be generous in the exercise of its authorities, its
25 record such as it appears can hardly be interpreted as

1 conveying the message to an inmate serving a life sentence
2 that he has something that he can rely on, that he has some-
3 thing that will not be taken away from him unless he does
4 something about it, or unless certain conditions can be estab-
5 lished, which are the grounds upon which such a legitimate
6 claim of entitlement must be premised.

7 Further, in Schick v. Reed, this Court dealt with
8 the authority of the United States Constitution of the
9 President to grant pardons. In Schick the Court characterized
10 one who seeks a pardon as a person who is petitioning for
11 mercy, and held that the President's pardoning power was
12 plenary, in that it entailed the authority to reduce or alter
13 the sentence which conditions which -- which themselves are
14 constitutionally unobjectionable.

15 Since the pardoning process is plenary, it would
16 seem to be conditioned only upon constitutionally unobjec-
17 tionable reasons. It would seem that the denial of the
18 pardon, similarly, is plenary, provided pardons are not
19 denied, or pardon relief is not denied for constitutionally
20 impermissible reasons. There is really no claim in this case
21 that inmates are denied pardon relief in Connecticut or that
22 the petitioners in this case are denied pardon relief in
23 Connecticut for constitutionally impermissible reasons.

24 The decisions of this Court which have found, in
25 the inmate context, which have found a constitutionally

1 protected claim of entitlement, are really not applicable to
2 this case. In Wolff, good time was given to the inmate, by
3 law, in Nebraska; good time could be deducted only for failure
4 to obey the rules of the prison. Thus the inmate had some-
5 thing that he could count on, and from my experience in the
6 Department of Corrections in Connecticut, inmates do count on
7 good time, which should only be taken from them if they do
8 something wrong. That's not true of an applicant for a
9 pardon.

10 I know that inmates when they are sentenced expect
11 or base their pleas or base their defenses, or even base
12 their conduct in prison, on the expectation that they're going
13 to get pardon relief. In Morrissey, the inmate had a parole;
14 he was in the community; he was with his family. For all but
15 some minor restrictions he was a free man. It's understand-
16 able that in Morrissey this Court held that before those free-
17 doms could be taken from him, he was entitled to some kind of
18 a due process hearing. Again, the lifer in Connecticut has
19 no such reasons in terms of anticipating a pardon.

20 In short, we claim that the decision of the 2nd
21 Circuit should be reversed.

22 QUESTION: Mr. O'Neill, your opposition really
23 isn't asking for very much here, is it? Just a statement of
24 reasons?

25 MR. O'NEILL: Yes.

1 QUESTION: Do you feel that your Board of Pardons
2 is able to deny relief for no reason at all?

3 MR. O'NEILL: I don't think that any state agency
4 has the right to be capricious and whimsical. If denying a
5 pardon for no reason constitutes being capricious, arbitrary,
6 then I would say, no, I don't think they have that power.

7 QUESTION: Well, wouldn't the question be, is the
8 Board entitled to grant a pardon for no reason?

9 MR. O'NEILL: I don't think they deny or grant
10 pardon for no reason, Mr. Justice.

11 QUESTION: Well, where does the burden of proof
12 lie? If there's a problem, a man is sentenced for a fixed
13 term, or for life, who has the burden of establishing a basis
14 for this extraordinary relief?

15 MR. O'NEILL: I think, Mr. Chief Justice, the
16 answer to your question derives from the concept of a pardon,
17 the Connecticut Board of Pardons, such as this Court indi-
18 cated in Schick, takes the position that if a man has been
19 sentenced, there's no challenge to the sentence, no challenge
20 to the conviction. What he's asking for is an act of mercy
21 to commute or shorten that sentence, and in short, their ap-
22 proach is, show us why we should extend this act of mercy to
23 you. And when a pardon is denied, in effect what the Board is
24 saying is that you haven't given us sufficient reasons why
25 we should do that.

1 QUESTION: May I ask, Mr. O'Neill, is it -- am I
2 correct that the practice, or rather, procedure followed by
3 the Board is, unless a member of the Board moves that a par-
4 don be granted, that's the end of the matter. There's no
5 consideration whether or not a pardon should be granted.
6 Doesn't some member of the Board, as a matter of the Board's
7 procedures, actually have to move it? Is that it?

8 MR. O'NEILL: Well, I don't know if it's as formal
9 as making a motion, Mr. Justice Brennan. What happens is
10 that when the Board breaks, the minutes are read, the names
11 of the inmates who appeared are read, and there is a
12 pause. And if any member of the Board wishes to discuss
13 Stephen O'Neill's case, he says so.

14 QUESTION: But what if someone doesn't say he'd
15 like to discuss Stephen O'Neill's case, there's no considera-
16 tion of pardon for Stephen O'Neill?

17 MR. O'NEILL: That is consideration. This is a --

18 QUESTION: Oh, that is consideration?

19 MR. O'NEILL: I would claim that it is. I mean,
20 everybody, the members of the Board know that this is the
21 practice, and they know that when that name is read, that that
22 is the time to speak up. Obviously, if --

23 QUESTION: If a reason were given to Stephen O'Neill
24 in that circumstance, what would the reason be? No member of
25 the Board moved your case?

1 MR. O'NEILL: Well, the reason would be, as I --
2 the real reason would be that I had not given the Board suf-
3 ficient reasons in their mind to --

4 QUESTION: For someone to move it?

5 MR. O'NEILL: -- to even consider giving me relief.
6 That is correct.

7 QUESTION: What is this Board? How is it appointed,
8 and how many members does it have?

9 MR. O'NEILL: It has five members, one of whom by
10 statute must be a Justice of the Connecticut Supreme Court.
11 They are appointed by the Governor with the approval of one
12 of the branches of the Connecticut Legislature.

13 QUESTION: For a term of how long?

14 MR. O'NEILL: I really don't recall.

15 QUESTION: So there's some turnover on the Board?

16 MR. O'NEILL: There is a turnover.

17 QUESTION: A new governor can't have a new Board?
18 Or does he?

19 MR. O'NEILL: Each governor could conceivably have
20 a new Board.

21 QUESTION: Have a brand new Board?

22 MR. O'NEILL: I believe, have a brand new board.
23 I've never heard of a situation where the incumbents were dis-
24 charged when a new governor came to office. Never heard of --

25 QUESTION: Mr. Attorney General, maybe I missed it,

1 but what is the reason that they don't give reasons?

2 MR. O'NEILL: Well, again, one goes back to the
3 philosophy of the Board. The reason is that they in effect
4 are telling the applicant, show us why we should do this.

5 QUESTION: Something like our practice of not
6 giving reasons for why we deny certiorari?

7 MR. O'NEILL: We don't claim to be a court or to
8 have judicial powers, but it is along those lines, Your
9 Honor; yes. And as indicated in the majority opinion in
10 Greenholtz, that these are motions and considerations and
11 decisions which don't readily lend themselves to a statement
12 of reasons.

13 QUESTION: Is there a statute that says that they
14 don't have to give the reasons?

15 MR. O'NEILL: The statute says nothing on it. As
16 a matter of fact, the 2nd Circuit said the statute gives them
17 unfettered discretion.

18 QUESTION: You don't say? Now, again, do you have
19 any reason?

20 MR. O'NEILL: I'm sorry, Your Honor.

21 QUESTION: I still want to know what the reason is
22 why you couldn't give a reason?

23 MR. O'NEILL: Well, you mean, just administratively
24 decide that, absent constitutional or statutory requirements?

25 QUESTION: There is no reason, right?

1 MR. O'NEILL: There is no constitutional require-
2 ment requiring it. There certainly is no statutory require-
3 ment in Connecticut. I said, even the 2nd Circuit said we
4 have unfettered discretion. Administratively, to decide, to
5 give reasons as an administrative policy?

6 QUESTION: Well, there might be five different
7 reasons.

8 QUESTION: I'm only asking for one.

9 QUESTION: But there might be no one reason.

10 QUESTION: I'm only asking for one.

11 QUESTION: There might be no one reason.

12 MR. O'NEILL: There might well not be. The reason
13 would again be that --

14 QUESTION: Well, if there are five, give me one of
15 the five.

16 MR. O'NEILL: All right. The reason would be that
17 what the Board would be telling the inmate is, you have not
18 shown us why we should extend this act of mercy or clemency
19 to you. That is standard, however it was --

20 QUESTION: And that would be true in every case?

21 MR. O'NEILL: However it was phrased, that would be
22 the message.

23 QUESTION: I don't see how Mr. Justice Stewart can
24 sit here in Washington and know what's going on in the Board
25 in Connecticut.

1 QUESTION: Well, I just read the Connecticut
2 statute, and that must be the reason in every case.

3 QUESTION: Well, I'm asking -- I'm asking this, now.

4 MR. O'NEILL: However, it was stated that would be
5 the reason.

6 QUESTION: You're speaking for the State of
7 Connecticut, right?

8 MR. O'NEILL: For the Board of Pardons, yes, Your
9 Honor.

10 QUESTION: For the State of Connecticut. And I'm
11 asking you, finally, for the last time, a reason for not
12 giving reasons.

13 MR. O'NEILL: The reason would simply be to the
14 inmate, you haven't shown us why we should extend that act of
15 clemency. What that would accomplish --

16 QUESTION: Well, I mean, that's your idea of a
17 reason.

18 MR. O'NEILL: -- or how that would help anybody --

19 QUESTION: That's your idea of a reason?

20 MR. O'NEILL: That is the reason, that is the
21 thought process that the Board goes through.

22 QUESTION: Didn't one member of the Board or former
23 member testify there would be no problem in giving a reason?

24 MR. O'NEILL: Well, he's testified that administra-
25 tively, if one devised a form with four or five patented

1 answers, it would be no great problem to check two or three
2 boxes on that printed form, but I think he also testified
3 that in his mind that wouldn't tell the inmate much of any-
4 thing, and doesn't advance or promote any cause or any jus-
5 tice, it's simply a pro forma useless act, that's what I think
6 he was really saying. Administratively, we could probably
7 handle that.

8 QUESTION: Mr. O'Neill, I gather that in a fairly
9 large number of cases the Board does act favorably to the
10 request for shortening the sentence?

11 MR. O'NEILL: In reducing the minimum term.

12 QUESTION: Yes. And when it does that, does it give
13 a statement of reasons?

14 MR. O'NEILL: No, it does not.

15 QUESTION: It just acts without explanation, either
16 granting or -- well what -- and there's an issue in this
17 case, or at least there's a question in the case as to -- if
18 there is some kind of a liberty interest at some point in
19 time, nobody's really decided when it might attach, and I
20 guess the lower courts were at the view it depends on how
21 soon there's a significant number of people who are getting
22 some kind of relief. What is in -- at what point in the
23 general sentence of a life term, at what point do most of
24 them finally get some kind of relief from the Board? Do you
25 have the experience on that subject?

1 MR. O'NEILL: The only evidence in the record was
2 that somewhere between 14 and 17 years, Mr. Justice Stevens.

3 QUESTION: Then over half of them would get some
4 kind of relief?

5 MR. O'NEILL: Roughly around 75 percent, yes.

6 QUESTION: It's over 75?

7 QUESTION: Mr. O'Neill, do you think the President
8 in the case like Schick v. Reed could be required to give a
9 statement of his reasons for denying or granting a pardon?

10 MR. O'NEILL: No, I do not, Your Honor.

11 QUESTION: Or any governor, where there is still
12 executive clemency? Incidentally, do you have any vestige
13 of executive clemency in the State of Connecticut?

14 MR. O'NEILL: Not, really. I believe there is some
15 authority in the Governor of the State of Connecticut to
16 grant temporary reprieves in capital cases, but nothing along
17 the lines of what we're talking about here.

18 QUESTION: But otherwise, your Board of Pardons
19 system has taken over completely?

20 MR. O'NEILL: That is correct; that is correct.

21 QUESTION: Do you know on the basis of your exper-
22 ience what is the general -- well, why do they let 75 percent
23 of the people out early? It's sort of strange. Is there any
24 guideline of any kind telling them what sort of rules to
25 follow or procedures, formal or informal?

1 MR. O'NEILL: There are a multitude of attitudes
2 and philosophies and guidelines and goals that the individual
3 members of the Board use, some of which are really hard to
4 define, as this Court, as a majority of this Court noted in
5 Greenholtz.

6 QUESTION: These are all cases in which the Legis-
7 lature has provided a mandatory minimum sentence and in 75
8 percent of cases the Board of Pardons just decides to over-
9 rule the Legislature, is that right?

10 MR. O'NEILL: Well, one must read, one must read
11 the Legislature's acts together. The Legislature has done
12 both. The Legislature has in effect set a minimum sentence
13 and at the same time has given the Board the authority --

14 QUESTION: And says, well, we really don't mean it
15 in 75 percent of the cases, is what it boils down to, I guess.

16 QUESTION: In some states, and I think it
17 has happened with the President of the United States, a par-
18 don or dispensation has been granted on a showing, for exam-
19 ple, that the prisoner has been in prison for 15 years, he
20 has a terminal cancer, has a year to live or less, and he
21 wants to die at home. Does that happen in Connecticut?

22 MR. O'NEILL: That has happened and that has been
23 the reason.

24 QUESTION: Yes, but not in 75 percent of the cases,
25 I don't suppose?

1 MR. O'NEILL: No.

2 QUESTION: But that's one of the kinds of cases
3 that they might consider, is that true?

4 MR. O'NEILL: That -- there have -- and there was
5 testimony in the record to that effect; yes, Mr. Chief Justice,
6 that that has been a factor. Performance, need, many
7 factors that would go into it, no one of which in any individ-
8 ual case, or in all the cases, would be the predominant
9 effect, and each case is considered on an individual basis.
10 And it is analogous to the thought process of a judge
11 in passing sentence.

12 QUESTION: How do cases get before the Board?

13 MR. O'NEILL: The inmate must apply.

14 QUESTION: How does he know that?

15 MR. O'NEILL: I believe it's in the record, Your
16 Honor. I know the only -- it's in the record that the only
17 requirement is that he must serve a year of his sentence
18 before he can apply. After that he can apply --

19 QUESTION: But how does he even know he can apply?
20 Has the Board issued any rules about how you're supposed to
21 proceed?

22 MR. O'NEILL: Yes, there are rules. They're not in
23 the record, but it is well known to the inmates at Somers.
24 The Board sits there four or five times a year, and it's
25 well known.

1 QUESTION: Well, does the Board -- has the Board
2 issued procedural regulations? If you want to come before
3 us, you do this, and you do that?

4 MR. O'NEILL: That you must apply; yes, there are
5 written procedures; yes, Your Honor.

6 QUESTION: And does it indicate what must be con-
7 tained in the petition? What do they call it? A petition
8 or what?

9 MR. O'NEILL: Petition; yes. I believe there are
10 copies of the printed petitions in the evidence.

11 QUESTION: But is there -- does the Board provide
12 a form?

13 MR. O'NEILL: A form is provided. Whether it's the
14 Board, or the Department of Corrections, the Board for fis-
15 cal purposes is a part of the Connecticut Department of
16 Corrections.

17 QUESTION: Yes, and do they -- and the form says,
18 please give reasons why, or does it say, does it ask some
19 specific questions that it wants answers to?

20 MR. O'NEILL: I'm looking for a form now. It pro-
21 vides for the name of the inmate, his age, where he was born,
22 what his crime was, where he was convicted and sentenced,
23 has he earned commutation of credit on his sentence, number
24 of times he has applied for the sentence, and concludes by
25 saying that he claims consideration, because. And then, on

1 this form, there is --

2 QUESTION: So, it doesn't indicate at all any of
3 the reasons that might be relevant to the Board?

4 MR. O'NEILL: No, but it gives the inmate a large
5 box to state why the Board should give him some relief.
6 And again, that is the way the Board looks at it.

7 MR. CHIEF JUSTICE BURGER: Very well. Your time
8 has expired now, Mr. O'Neill.

9 MR. O'NEILL: Thank you, Mr. Chief Justice.

10 MR. CHIEF JUSTICE BURGER: Mr. Wizner.

11 ORAL ARGUMENT OF STEPHEN WIZNER, ESQ.

12 ON BEHALF OF THE RESPONDENTS

13 MR. WIZNER: Mr. Chief Justice, and may it please
14 the Court:

15 The issue in this case is whether the Court of
16 Appeals correctly applied this Court's decision in Greenholtz
17 v. Nebraska Penal Inmates to the sentence commutation process
18 for a few life inmates in Connecticut. And the reason that I
19 emphasize a "few" life inmates, as we have emphasized in our
20 brief, is that we are talking about a relatively small class
21 of inmates which at the time this action was brought in
22 1975 --

23 QUESTION: Well, the real question in this case is
24 whether or not the Constitution requires the Board to give
25 reasons for its failure to grant a pardon.

1 MR. WIZNER: That's right, Justice Stewart. And
2 the answer to this question must be found in the practices of
3 the Connecticut Board of Pardons because the Connecticut
4 statute does not contain the "shall - unless" language of
5 the Nebraska statute, which was at issue in Greenholtz.

6 So the real issue, I think, is whether or not in
7 the absence of a statute which contains such "shall - unless"
8 language a state board may by consistent practice over an
9 extended period of time establish a practice rooted in the
10 implementation of a state statute which creates an entitle-
11 ment.

12 QUESTION: Didn't the Greenholtz opinion for the
13 Court emphasize the key to it was the language of the Nebraska
14 statute?

15 MR. WIZNER: Yes, it did, Your Honor.

16 QUESTION: What's that got to do with its practice?

17 MR. WIZNER: Mr. Chief Justice, if I may respond
18 to that, this Court as you well know, in Greenholtz stated
19 that in that case the Nebraska statute by its terms created
20 an entitlement. Whether or not such language would be neces-
21 sary in future cases, the Court said, will have to be decided
22 on a case-by-case basis.

23 The 2nd Circuit, the circuit from which we come
24 with this case, has already had occasion, several occasions,
25 to consider Greenholtz, and has held that in the absence of

1 any other evidence, if you have a purely discretionary statute
2 such as the one we have here, no entitlement is created and
3 no legitimate claim of entitlement is created. Our position
4 is that the Connecticut Board of Pardons has structured the
5 exercise of its own discretion that it was given by the
6 legislature, plenary discretion in the nature of any other
7 pardoning authority, but with respect to this
8 particular group of inmates, it has limited the
9 exercise of its own discretion by granting
10 relief to almost all of them.

11 QUESTION: So that it's in effect boxed itself in?

12 MR. WIZNER: Well, not really, Mr. Justice
13 Rehnquist. This is not a case where we're claiming just be-
14 cause they'd granted relief consistently in the past they have
15 to keep doing it.

16 QUESTION: But if after this decision they started
17 not granting any relief at all or granting relief to 20 or
18 30 percent rather than 70 percent, then the case would be
19 wholly different, I take it.

20 MR. WIZNER: It would be and we think they can do
21 that. We think that as long as they are granting relief to
22 at least 75 and perhaps 90 percent of inmates, permitting them
23 to apply every year, the testimony from the Pardon Board
24 Chairman was, we know that they're looking at us very closely.
25 The Board knows that these applications are being made, and

1 establishing a very complex procedure for determining that
2 reliable factfinding will take place, a procedure which we
3 don't claim entitlement to, incidentally.

4 QUESTION: Well, on the basis of that argument,
5 could not an equally plausible argument be made that since
6 you're granting 70 percent in the past, you must grant 70
7 percent this year? I want in on that 70 percent.

8 MR. WIZNER: No, Your Honor. And that is not our
9 claim in this Court and was not our claim below.

10 QUESTION: But isn't it equally plausible?

11 MR. WIZNER: With all respect, Your Honor, I think
12 it is not equally plausible. I think that what we're claiming
13 is that when relief is granted this consistently, it impli-
14 cates a liberty interest and creates a legitimate claim of
15 entitlement, a claim of entitlement to have applications for
16 sentence reduction on the part of these inmates fairly con-
17 sidered. We are not saying that the Board of Pardons has
18 painted itself into a corner as Justice Rehnquist suggests
19 and obligated itself to grant pardons to life inmates into
20 the future. In fact, it's hard to understand, as Justice
21 Stevens pointed out, why it is that Connecticut is
22 granting relief to so many life prisoners.

23 QUESTION: Mr. Wizner?

24 MR. WIZNER: Yes, Mr. Justice Marshall?

25 QUESTION: What would happen if they gave the

1 following reason? No member of the Board having wished to
2 discuss it, we didn't discuss it.

3 MR. WIZNER: Mr. Justice Marshall, we do not think --

4 QUESTION: Would that be enough reason?

5 MR. WIZNER: No. No, sir, we do not think,
6 Mr. Justice Marshall --

7 QUESTION: Would you mind addressing to what kind
8 of reason?

9 MR. WIZNER: Yes, I will.

10 QUESTION: Because, you know, I don't know of any
11 case where we've spelt out what reasons ought to be given.

12 MR. WIZNER: All right.

13 QUESTION: In due process things.

14 MR. WIZNER: Yes, sir. We, of course, have to
15 acknowledge --

16 QUESTION: And does the 2nd Circuit have a rule
17 for rehearing which says, "No active judge having voted for
18 rehearing, the rehearing is denied?" Isn't that a reason?

19 MR. WIZNER: It's a reason for them.

20 QUESTION: Isn't that a reason?

21 MR. WIZNER: That is a reason for a court not to
22 grant rehearing. That is not a reason for an administrative --

23 QUESTION: But -- I'm just working on the word,
24 "reason."

25 MR. WIZNER: Yes. As far as we're concerned, that

1 would not be a reason that would be a meaningful reason that
2 would --

3 QUESTION: What kind of reason, please?

4 MR. WIZNER: Very well. We think a reason has to
5 be given which shows -- admittedly, the Board has very broad
6 discretion, and can give almost any reason it wishes other
7 than a constitutionally impermissible basis for denying the
8 pardon. But we think they have to give a reason which will
9 accomplish several of the objectives of the parole system in
10 Connecticut, of which the sentence commutation process is a
11 part. It would have to be a reason, if the denial of the
12 sentence commutation were based on institutional conduct, it
13 would have to be a reason which would inform the inmate of
14 what he has to do to improve his conduct so that he might be
15 eligible the next time.

16 QUESTION: Well, wouldn't the next step after that
17 be that if the inmate denied the reason, there would have to
18 be a hearing?

19 MR. WIZNER: The Connecticut Board of Pardons al-
20 ready permits an inmate to come back and try to correct any
21 misunderstandings the Board may have.

22 QUESTION: Well, I know, but you would say it would
23 be constitutionally required?

24 MR. WIZNER: We wouldn't say --

25 QUESTION: If this was a liberty -- if it's a

1 liberty interest?

2 MR. WIZNER: I would say that some mechanism would
3 have to be offered to the inmate to review an erroneously
4 based decision, if the Board --

5 QUESTION: No, only that there would have to
6 to be a mechanism of some kind, a hearing or some other suit-
7 able -- ?

8 MR. WIZNER: That's right. I'm not trying to hedge.
9 Obviously, a statement of reasons opens a decision to review.

10 QUESTION: How about an attorney?

11 MR. WIZNER: No, we don't claim a right to an
12 attorney.

13 QUESTION: Well, you don't now, but, soon?

14 MR. WIZNER: No. As a matter of fact, Justice
15 White, we don't even claim the procedures that are now con-
16 ferred upon inmates. Our position is that those procedures
17 express an intention upon the Board to engage in reliable
18 factfinding and a communication to the inmate that meritorious
19 applications will be fairly considered and will be granted,
20 if they deserve to be granted.

21 QUESTION: Well, Mr. Wizner, what Mr. O'Neill told
22 us, or I thought he did, about their present practice, which
23 is that they have a list of names. If no one raises a partic-
24 ular name as one for consideration, that's the end of the
25 matter as to him. Now, they'd have to change all that now

1 under your submission, would they not?

2 MR. WIZNER: That's right. They would have --

3 QUESTION: Now, what they'd have to do, they'd have
4 to sit down, they'd have to take up John Jones, or Stephen
5 O'Neill, and decide that, why in Stephen O'Neill's case they
6 ought not grant it if they're not going to. Then they'd
7 have to agree on a reason, wouldn't they?

8 MR. WIZNER: Yes, Mr. Justice Brennan.

9 QUESTION: By a majority vote or something like
10 that?

11 MR. WIZNER: Justice Brennan, yes; in that respect
12 Justice Rehnquist is correct, they have painted themselves
13 into a corner. If they're granting relief -- and our posi-
14 tion is that it's not three-quarters of the cases, it's almost
15 90 percent of the cases -- if they're granting relief that
16 consistently, then they have to give a reason that explains
17 why it is that they're denying it to the few people that --

18 QUESTION: They'd have to agree upon the reason,
19 wouldn't they?

20 MR. WIZNER: And they would have to deliberate.
21 The problem with the way they decide cases now is they sit
22 all day long and hear 60 cases, one after another after
23 another, and the testimony from the Pardons Board Chairman
24 was that it was an emotionally exhausting experience. At the
25 end of the day, at 7 or 8 in the evening --

1 QUESTION: Well, why wouldn't it satisfy your re-
2 quirement if all members of the Board indicated his reasons
3 individually and they had no meeting of the Board?

4 MR. WIZNER: That would satisfy us, if we got a
5 reason from each member of the Board. We just want reasons.
6 We think --

7 QUESTION: They'd have to agree by majority vote,
8 then, on a single reason?

9 MR. WIZNER: It doesn't have to be a majority vote
10 on a single reason.

11 QUESTION: Each of them, Jones, Smith, so forth,
12 can have a separate reason?

13 MR. WIZNER: Yes; yes.

14 QUESTION: And it wouldn't need to have a meeting
15 or deliberate.

16 MR. WIZNER: That's right. If each of them gave a
17 reason so at least the inmate could be informed why it was
18 that he was singled out for differential treatment when most
19 other people whom he thinks are similarly situated in the
20 same prison are receiving relief.

21 QUESTION: How many members of the Board are there?

22 MR. WIZNER: There are five.

23 QUESTION: So he might have been told five
24 different reasons?

25 MR. WIZNER: He might have been told five different

1 reasons and in fact the kinds of reasons which the Chairman
2 testified did control these decisions were at least five.
3 I can suggest some of the reasons that are in the record.

4 QUESTION: And if one or more of the five is incor-
5 rect, what to do? Get a review by the full Board?

6 MR. WIZNER: If four out of the five members have
7 valid reasons --

8 QUESTION: If we have five separate reasons, as you
9 suggest would satisfy the requirement, but one or two is
10 incorrect, what happens then?

11 MR. WIZNER: The issue is not whether or not they're
12 incorrect. Conceding as we do that the criteria for granting
13 relief can be very broad and --

14 QUESTION: Nevertheless, there may be a stated rea-
15 son by one of the Board members that the prisoner says, that
16 just isn't true. That simply isn't true.

17 MR. WIZNER: He would have to be afforded an oppor-
18 tunity to correct that reason.

19 QUESTION: Even though the other four were accepted?

20 MR. WIZNER: Yes. In our judgment even one member
21 of the five-member Board cannot deny a pardon for a consti-
22 tutionally impermissible reason.

23 QUESTION: Well, Mr. Wizner, supposing that the
24 Parole Board -- you say that the Court of Appeals for the
25 Second Circuit and the Supreme Court of Connecticut and the

1 statute confer upon it unfettered discretion, at least by
2 statute.

3 MR. WIZNER: Statute; yes.

4 QUESTION: And supposing it chose to operate in a
5 manner that, simply, they met once every six months and any
6 member of the Board could put an applicant's name on a list
7 to be considered, and if the applicant's name wasn't put on
8 the list to be considered he simply never would be considered.

9 MR. WIZNER: Yes, we think that would be consti-
10 tutionally permissible and consistent with the kind of tradi-
11 tional plenary exercise of the pardon power that was
12 described by the Court in Schick. But that's not what's
13 happening here. What's happening here is an administrative
14 agency constituted by the Legislature receiving applications,
15 some 300 a year, and deciding 60 cases in each of four cities
16 and rendering decisions on --

17 QUESTION: Why do you distinguish between an admin-
18 istrative body and a judicial body?

19 MR. WIZNER: If Your Honor please --

20 QUESTION: For constitutional purposes?

21 MR. WIZNER: For constitutional purposes, for the
22 same reason that judges are not required to give reasons for
23 their sentences and juries are not normally required to give
24 reasons for their verdicts. We think that the decisions by
25 the judiciary, by the judicial department, are different from

1 these kinds of decisions.

2 First of all, the actions of juries are reviewable
3 by the judge, as was shown in one of the cases decided this
4 morning. Actions by a judge are reviewable by appellate
5 courts, some of them.

6 QUESTION: What about this Court?

7 MR. WIZNER: But not by this Court. And, inci-
8 dentally, the granted --

9 QUESTION: When we deny certiorari, as I suggested
10 to your friend, you do not suggest that we must give a reason?

11 MR. WIZNER: While some of us might like reasons,
12 I wouldn't suggest that you're obligated to or that we're
13 entitled to them. But there is a difference, if I could
14 point it out.

15 QUESTION: What if each of the members of the
16 Board filed a statement essentially saying, denied because the
17 petitioner has presented no reason that it should be granted?

18 MR. WIZNER: The Connecticut Board of Pardons
19 would be perfectly within its discretion to do that if it
20 weren't granting relief to almost every member of our class.
21 I think that wouldn't be a sufficient reason to --

22 QUESTION: I understand.

23 QUESTION: My question is, suppose in every case
24 from now on they gave that, "because no reason has been
25 advanced why the petition should be granted." Isn't that a
reason?

1 MR. WIZNER: Mr. Chief Justice Burger, that is not
2 a reason. It doesn't explain anything to the inmate about
3 why he was singled out as a member of that small group of
4 perhaps ten percent of inmates who was not granted relief.

5 QUESTION: These are only inmates serving life sen-
6 tences?

7 MR. WIZNER: These are --

8 QUESTION: And why is that?

9 MR. WIZNER: There is an explanation for this,
10 Your Honor.

11 QUESTION: I'd be interested in it.

12 MR. WIZNER: And it's an explanation that I -- I
13 puzzled, as did Justice Stevens, about why all of these
14 lifers who are after all, all of them convicted of murder,
15 why they are getting relief so consistently. If one --

16 QUESTION: Well, why is the plaintiff class limited
17 to those serving life sentences?

18 MR. WIZNER: Because they're the only ones who are
19 not eligible for parole unless the Pardon Board grants them
20 a sentence commutation. They are not paroled --

21 QUESTION: I thought that a life sentence meant
22 20 years, if the person --

23 MR. WIZNER: Here's how a state life sentence works.
24 Prior to the repeal of the Penal Code in 1971, lifers re-
25 ceived a sentence of 25 years to life. During the first

1 20 years of their sentence they did not receive the benefit
2 of their good time, although five years of good time was
3 given to them during the first 13 years of their sentence.
4 At the point where they reached 20 years, the five years of
5 good time was given to them as a lump, and they were imme-
6 diately reduced to 20 years and eligible for parole.

7 By reducing the lifer sentence to 20 years at some
8 point during the first 20 years, the lifer gets the benefit
9 of those five years. That automatically reduces him to 15
10 years. So that Mr. Gates's testimony of somewhere between
11 14 and 17 years has quite a rational basis. What the Pardon
12 Board is doing in these cases is saying that lifers should
13 have the benefit, as a rule, of good time just as all other
14 inmates do, and the reason that they're doing it is so that
15 lifers won't feel totally frustrated that they have no oppor-
16 tunity for ever getting released.

17 QUESTION: To earn good time?

18 MR. WIZNER: To earn good time.

19 QUESTION: Until they've served --

20 MR. WIZNER: Until they have served --

21 QUESTION: Twenty years.

22 MR. WIZNER: -- the full 20 years. And that is
23 why, if you look at --

24 QUESTION: That law has been changed, hasn't it?

25 MR. WIZNER: That law has been changed. Since 1971

1 the Legislature has elected to give lifers minimum terms,
2 so that some lifers have minimum terms as low as ten years.
3 With the benefit of good time they are eligible for parole
4 after serving something like two-thirds of their minimum
5 sentence. What the Legislature did is it acknowledged that
6 some lifers should receive minimum sentences lower and some
7 higher. However, as of July of this year, the sentence is
8 going back to 25 years to life. And the reason for that is
9 that Connecticut is abolishing parole, as of July of this
10 year. So that the only inmates for whom this decision, a
11 decision in this case, would have any impact, would be this
12 small group of 30 or fewer inmates.

13 QUESTION: Thirty-five --

14 MR. WIZNER: On 35. I'm sure it's not 35 anymore.
15 It was 35 in 1975.

16 QUESTION: Perhaps not. And did I understand you to
17 say that in Connecticut murder is the only offense for which
18 a life sentence can be imposed?

19 MR. WIZNER: That's not the only offense, and
20 there's a footnote in our brief that -- all of our clients
21 have committed murder, but there's a footnote in our brief
22 that also provides for life sentences in certain limited
23 situations for persons who lie in wait and pluck out the eyes
24 of the victim or do damage to certain parts of their bodies.

25 QUESTION: There's nobody in the Connecticut

1 prisons convicted of --

2 MR. WIZNER: No.

3 QUESTION: Mr. Wizner, have you ever read an opinion
4 of a court which says, "We have examined all of the points
5 raised and find no merit in any of them?"

6 MR. WIZNER: I have read opinions like that, Your
7 Honor.

8 QUESTION: Yes. Well, would that be all right if
9 this Board said, we have examined this whole case of
10 Mr. -- whatever this man's name was?

11 MR. WIZNER: O'Neill, I think, was the example,
12 Mr. Justice Marshall.

13 QUESTION: Well, Marshall, and we find no merit
14 in it. That wouldn't be sufficient?

15 MR. WIZNER: No, it would not, Justice Marshall.
16 Except --

17 QUESTION: Why would that -- would a conviction
18 that puts a man in jail not require it, but this one to get
19 out of jail does require it?

20 MR. WIZNER: Because the Legislature has made clear
21 in the case of a man convicted and sent to jail what it is
22 that has to be found before that can happen. The Pardon Board
23 hasn't told us what reasons or criteria it is applying. If
24 the Pardon Board said --

25 QUESTION: Well, what rules are there in Connecticut

1 that tell the court how to decide a case?

2 MR. WIZNER: There is only the statute, the Legisla-
3 ture --

4 QUESTION: Well, what statute? Does the statute
5 say what you must find?

6 MR. WIZNER: The statutes defining crimes define
7 the elements of the offenses.

8 QUESTION: Does the statute define what reasons
9 have to be given?

10 MR. WIZNER: The reasons have to be that the defen-
11 dant has been found guilty beyond a reasonable doubt of
12 each and every element of the offense prescribed by the
13 statute.

14 QUESTION: Does the statute say what reason the
15 appellate court has to give? That's what I was talking about.

16 MR. WIZNER: No, it does not. I'm sorry; I mis-
17 understood.

18 QUESTION: Right.

19 MR. WIZNER: I should listen to your questions.

20 QUESTION: Now we're back to your case, in which you
21 say that for this reason you must get more than you get out
22 of an appellate court.

23 MR. WIZNER: The reason why you must get more is,
24 first of all, when the appellate court is reviewing a deci-
25 sion of the trial court, it is deciding several things, but

1 above all it is looking at a conviction for a crime in a criminal
2 case where each of the elements of the offense has been
3 proved to the satisfaction of the trier of fact beyond a
4 reasonable doubt. We have no criteria here. If the Connecticut
5 Board of Pardons said, sentence commutations for persons
6 serving life sentences under the old penal law which was repealed
7 in 1971, the following five criteria will be considered,
8 and then the Board can say, we have considered all
9 the five criteria and we find that he doesn't satisfy them,
10 that would be enough.

11 QUESTION: Well, didn't some of your people go all
12 through a trial and an appeal?

13 MR. WIZNER: All of our people were convicted.

14 QUESTION: I thought so.

15 QUESTION: I'm ready to bet anything you want to
16 get more now than you got all the way up.

17 MR. WIZNER: Your Honor, Mr. Justice Marshall, I'm
18 not here asking for the release of my clients.

19 QUESTION: You see my problem with that?

20 MR. WIZNER: I am not here asking for the release
21 of my clients, and it may well be that a requirement that
22 reasons be given will inhibit arbitrary granting of relief as
23 well as arbitrary denial of relief, and I really don't know
24 what the consequence of it would be. All I know is that
25 our clients, the named plaintiffs in this case, do not

1 understand why they were not granted the same relief that
2 everyone else was granted.

3 QUESTION: Do your defendants have that sort of
4 reason-giving in the process of finding their guilt? A jury
5 comes in with a general verdict of guilty. Do you think it
6 has to state a reason why it found them guilty?

7 MR. WIZNER: No, I don't, Justice Rehnquist. The
8 decision of the jury, as this Court decided today, may be
9 set aside by a judge if there was not sufficient evidence
10 to support it. There is no such check on the actions in the
11 Connecticut Board of Pardons.

12 QUESTION: But a jury's verdict of guilty is defined
13 by the metes and bounds of the instructions on the law given
14 to it.

15 MR. WIZNER: That's right. Similarly, we have no
16 such instructions from the Legislature given to the Board of
17 Pardons. What the Legislature has told the Board of Pardons
18 of this case, basically, is you can do whatever you want to
19 as long as it's not arbitrary.

20 QUESTION: From what you have said so far,
21 Mr. Wizner, I get the impression that you're saying that
22 when a prisoner files the petition it should be in effect
23 treated as an order to show cause directed to the Board why,
24 to state why he should not be released. Isn't that the prac-
25 tical effect of it?

1 MR. WIZNER: With all respect, Mr. Chief Justice,
2 that is not the practical effect.

3 QUESTION: You tell me why it isn't.

4 MR. WIZNER: I will tell you why it isn't.
5 I wouldn't be here today if the Connecticut Board of Pardons
6 were not granting relief to almost 90 percent of the members
7 of the class I represent.

8 QUESTION: Well, then, is not the petition, doesn't
9 it function as a direction to the Board, on your submission,
10 that you must give me a reason why you do not release me,
11 or else release me? That's what you're asking for.

12 MR. WIZNER: I'm not seeking release. I'm assuming
13 that the Board of Pardons has a reason for not releasing my
14 clients. I'm just saying, tell them why. But you're right;
15 in that sense it's like an order to show cause. I'm saying
16 that 90 percent of my clients are getting it, ten percent
17 are not getting it. It rises to the level of you having to
18 show us why it is that they're not getting it. But then our
19 position is, almost any reason is sufficient so long as it's
20 a reason which explains why they haven't gotten it and it's
21 not based on constitutionally impermissible grounds.

22 QUESTION: Well, and as long as you don't challenge it
23 as being inaccurate, in which event you suggest that there
24 should be a review procedure.

25 MR. WIZNER: But the Connecticut Board of Pardons

1 already permits that, sir.

2 QUESTION: Well, I know, but you are also saying,
3 I'm sure, that it would be constitutionally required?

4 MR. WIZNER: If the Board of Pardons decides a case
5 on constitutionally impermissible grounds.

6 QUESTION: No, I didn't say that. I said, just
7 inaccurate grounds.

8 MR. WIZNER: The scope of review would be like the
9 review of an administrative agency, very narrow.

10 QUESTION: Well, review by whom?

11 MR. WIZNER: It could be review by the Board of
12 Pardons itself, or judicial review in the state courts.

13 QUESTION: I know, but would you say the Constitu-
14 tion required judicial review of it?

15 MR. WIZNER: I don't say the Constitution requires
16 judicial review. I would say it would require some mechanism
17 for correcting constitutionally impermissible --

18 QUESTION: Well, let's suppose one of the five
19 says, I'm not going to vote to give you a pardon, because you
20 battered your cellmate over the head with a club the other
21 day. And he says, I never did anything of the kind, that's
22 not true, I never did anything of the kind. Now, as I under-
23 stand it, you're suggesting that he's entitled to some kind
24 of administrative review of the truth of that, isn't he?

25 MR. WIZNER: He has the burden of proving that it

1 didn't happen.

2 QUESTION: I know. But he says, it isn't true, and
3 the Board then has to hear him and decide whether it's true
4 or not. Right?

5 MR. WIZNER: I think the Board is entitled to rely
6 on the information it receives from the prison authorities,
7 provided that he had a fair institutional disciplinary hearing.

8 QUESTION: I know, but he says, I will carry the
9 burden of proving that I never did anything of the kind.
10 It's just not true. I didn't do that. And I thought you
11 told me earlier that he'd be entitled to review by the
12 Board of of such claim?

13 MR. WIZNER: He is entitled to some review, to a
14 chance to show that --

15 QUESTION: All right, and the member who gave that
16 reason is finally persuaded that, no, it wasn't true, and I
17 withdraw those reasons. What does he get?

18 MR. WIZNER: Then he gets whatever the Board orders
19 that he gets, either --

20 QUESTION: Four other members have given other rea-
21 sons which he hasn't challenged.

22 MR. WIZNER: Then he has nothing left. If four
23 other members have given reasons why he should be denied
24 relief, then he should be denied relief. And what we're
25 saying in this case, that it -- excuse me, Mr. Justice Stevens.

1 QUESTION: Mr. Wizner, isn't it probable in the case
2 where a Board member relied on a disciplinary infraction, that
3 would have been supplied to him in some kind of a report as
4 a result of a proceeding that had already taken place?

5 MR. WIZNER: That's the point I was trying to make.

6 QUESTION: He doesn't know about the facts that
7 go on in the prison, other than what's supplied at the
8 Board hearings.

9 MR. WIZNER: That's correct, and that's what --

10 QUESTION: And the review presumably would have
11 already been had on that kind of an issue.

12 MR. WIZNER: That's right, Justice Stevens.

13 QUESTION: I just want to be sure you've said
14 everything you want to say on the question of, why must
15 these officials give reasons when judges don't have to give
16 reasons in a whole host of situations? And the one that I
17 find the closest, frankly, is the sentencing function per-
18 formed by the trial judge. Does your position require as a
19 matter of consistency that we also say a trial judge should
20 have to give reasons when he decides how long a sentence shall
21 be imposed?

22 MR. WIZNER: No, it doesn't.

23 QUESTION: And why not?

24 MR. WIZNER: It doesn't, Justice Stevens, although
25 assuming it would favor a rule which required trial judges

1 to give statements of reasons for sentences, the Legislature
2 in the case of sentencing has created outer bounds for sen-
3 tencing.

4 QUESTION: That's right. Here we've got outer
5 bounds too.

6 MR. WIZNER: And here we have outer bounds too,
7 but we have an agency which has limited its own bounds, it has
8 structured the exercise of its discretion by acting in a
9 certain way over and over and over again.

10 QUESTION: Trial judges do this too. Some judges
11 give certain sentences in certain kinds of crimes, but they
12 just don't bother to say so. Why wouldn't your argument com-
13 pel this? And I'm not saying this necessarily makes your
14 argument wrong, but is there really a principal distinction
15 between what you're asking us to hold for this part of the
16 sentencing process -- because, in a sense, this is really a
17 part of the sentencing process -- is this really constitu-
18 tionally different from what the trial judge does at the time
19 that the man is found guilty?

20 MR. WIZNER: It has to be constitutionally signifi-
21 cant, although I agree with you that -- I don't know if I'm
22 agreeing with you -- I would prefer, obviously, to have judges
23 give reasons, but I think that when a state agency and a
24 branch of the executive acts, it's different than when a
25 court or a judge acts. If a judge is acting within the

1 discretion that has been conferred upon him by the Legisla-
2 ture and is imposing a sentence within the limits set by the
3 statute and if you know what the sentence is being imposed
4 for, which is a particular crime with particular elements,
5 then I don't think the judge is constitutionally required to
6 give reasons. Another reason is just based on the separation
7 of powers, I would think.

8 QUESTION: Supposing, following up on Justice
9 Stevens' question, that a particular judge has a reputation
10 for being very severe on narcotics cases and generally sen-
11 tences to the maximum authorized by law in those cases, say
12 in 90 percent of the cases that come before him, but in ten
13 percent he doesn't. Now, do you think that one, a member of
14 that ten percent has a right to go to some court and claim,
15 or go to the appellate court and claim that he has a consti-
16 tutional right to have an explanation from the sentencing
17 judge as to why he of the ten percent was singled out, whereas
18 90 percent were not?

19 MR. WIZNER: There might well be such a reason in
20 that case and the analogy I think of, Justice Rehnquist, is
21 the draft evasion cases where appellate courts held that
22 where judges automatically sentenced draft evaders to the
23 five-year maximum sentence under the statute, the cases had
24 to be remanded to the trial courts so that the trial judge
25 would exercise discretion in determining what sentence should

1 be applied to the particular offender.

2 QUESTION: Did this Court ever hold that?

3 MR. WIZNER: Not to my knowledge, Your Honor. It's a
4 good rationale, though, I think, and one that I would urge
5 upon the Court. If the trial judge consistently and syste-
6 matically without considering the individual characteristics
7 of offenders were to impose the maximum sentence for a partic-
8 ular crime, I would think that that kind of practice should
9 be subject to appellate review. I would think that, perhaps
10 not a statement of reasons but at least a remand to the trial
11 court to insist that discretion be exercised in the imposi-
12 tion of the sentence.

13 QUESTION: But how would you know that discretion
14 was being exercised unless you had a statement of reasons?
15 Just a remand, and then the judge simply imposes the same
16 sentence again without saying anything more?

17 MR. WIZNER: I think a sentencing judge who is
18 engaging in the practice I have just described ought to be
19 required constitutionally to give reasons for what he's doing.
20 Yes, Your Honor. Fortunately, that issue doesn't have to
21 be reached in this case.

22 QUESTION: In abolishing parole did Connecticut also
23 set definite terms for certain crimes?

24 MR. WIZNER: Yes, it did, Your Honor.

25 QUESTION: And eliminated judicial discretion to a

1 great degree?

2 MR. WIZNER: Yes, it did. It did eliminate judi-
3 cial discretion, substantially. It has done what other states
4 have done in abolishing parole, which is to establish fixed
5 sentences and inmates know exactly when they're going to get
6 out, less good time, once, when those sentences are imposed.

7 QUESTION: So a good many times it wouldn't do a
8 judge any good to have any reason at all? He's just required
9 to impose a sentence?

10 MR. WIZNER: That's right. I mean, the Legislature
11 has spoken to that exact issue, and they want to limit the
12 discretion of everyone involved in the sentence-imposing
13 and sentence-reduction process in Connecticut.

14 QUESTION: But Connecticut has retained, while
15 eliminating discretion, has retained this provision giving
16 the Board complete discretion on parole?

17 MR. WIZNER: That's right. And they have returned
18 to 25-year minimum sentences for lifers commencing in July
19 of this year. The situation will be somewhat different, how-
20 ever, since they won't be eligible for parole accelerations
21 because there won't be any parole. So we continue to be
22 faced only with the problem of the small group of people
23 whom we represent.

24 QUESTION: Are you familiar with how many states
25 have abolished or cut back their parole statutes?

1 MR. WIZNER: I am not. I gather from my reading
2 that it is a movement that is afoot to abolish parole and --

3 QUESTION: I am sure it is not a desire on your
4 part to see this dispensation that now exists under the
5 Board in Connecticut abolished too? That's not what you're
6 after?

7 MR. WIZNER: I'm not asking the Court to do that;
8 certainly not. And that's not what I'm after. In fact,
9 what I'm after seems to me to be very little, although the
10 issue of whether or not there is an entitlement to it is of
11 course a major issue. What I'm after is an explanation to
12 the few people who aren't getting the relief that almost
13 everyone else who committed the same crime is getting about
14 why they're not getting it.

15 QUESTION: Mr. Wizner?

16 MR. WIZNER: Yes, Justice Marshall?

17 QUESTION: Is it true that in Connecticut you can
18 appeal the sentence?

19 MR. WIZNER: Yes. There is a Sentence Review Board
20 in Connecticut in which you can have your sentence reviewed
21 by a panel of three judges. That is correct.

22 QUESTION: Upon a conviction?

23 QUESTION: And these people went through that?

24 MR. WIZNER: No, I don't think lifers are eligible
25 for sentence review. They have a mandatory 25-year to life

1 sentence, Justice Marshall.

2 QUESTION: Well, that's what I wanted to know.

3 MR. WIZNER: That's another reason why the Pardon
4 Board may have been granting relief on a higher percentage
5 of cases of lifers than other people, that they can't get
6 the benefit of their good time and they can't get their
7 sentences reduced any other way.

8 QUESTION: Well, it would be the next -- it would
9 a consistent step to take for Connecticut to eliminate this
10 discretionary part of sentencing also, wouldn't it?

11 MR. WIZNER: Yes, it would. They haven't done that,
12 and I doubt that they could do it retroactively to affect
13 my clients, but certainly they could do that.

14 QUESTION: But that isn't your objective, you've
15 indicated previously?

16 MR. WIZNER: That is not my objective, Your Honor,
17 I would not come to court to seek the elimination of discre-
18 tion and the denial of relief to clients whom I'm representing.
19 On the other hand, I want the Court to understand that our
20 position is that the Legislature has that discretion. They
21 can do that if they want to.

22 QUESTION: But you are aware, I take it, that the
23 states which have abolished parole have done so because
24 of the difficulties imposed by entitlement claims over the
25 last few years?

1 MR. WIZNER: That is correct, Your Honor, and I am
2 not opposed to that. It seems, if I may address your ques-
3 tion, which is not directly involved in our case, it seems
4 to me that correctional officials ought to be applying fixed
5 sentences and that there ought not to be so much discretion
6 in the system, because it creates the risk of arbitrariness
7 which I think exists in this case. If there were a consistent
8 set of criteria and a -- may I finish my question? -- if
9 there were a consistent set of criteria being applied and
10 fair deliberation being had on each application for parole,
11 and there were sensitive consideration being given to the
12 rehabilitative goals of the penal correctional process, it
13 might be different. But our experience has been, both in
14 state and federal parole systems, that that is not happening.

15 QUESTION: But it's only 15 or 20 years ago,
16 Mr. Wizner, though not literally every one, but almost every
17 one dealing with these problems thought the indeterminate
18 sentence was the great wave of the future, the best thing
19 that ever happened. And now, in a short period of time,
20 for the very reasons you have just suggested the indeterminate
21 sentence is now regarded 180 degrees differently, and --

22 MR. WIZNER: That's right, Your Honor.

23 QUESTION: And there's a move to abolish it and
24 make sentences fixed. Now, what you're asking is that we
25 constitutionalize a proposition that's, really, no one knows

1 fully and understands fully.

2 QUESTION: Mr. Wizner, may I ask you a question?
3 Or am I interrupting you, Mr. Chief Justice?

4 QUESTION: No, no. You're not.

5 QUESTION: You're not asking for a hearing, as I
6 understand it?

7 MR. WIZNER: We are not.

8 QUESTION: If the Court should create a liberty
9 interest, would it not follow that these inmates would be
10 entitled to a hearing as well as a statement of reasons?

11 MR. WIZNER: I hesitate to argue against myself,
12 but I do not think so, Justice Powell. I think the process
13 that's due in this situation is a statement of reasons.
14 I don't think that, in view of the very broad discretion that
15 the Legislature has given the Pardon Board and the fact that
16 it is in effect commuting sentences validly imposed, that a
17 full hearing is not necessary. However, the Connecticut
18 Board of Pardons now does give a full hearing with a right
19 to counsel, with a right to produce witnesses, with a right
20 to examine the prison file, and they even invite the State's
21 Attorney from the county in which the individual defendant
22 has been convicted to come and state his view. And indeed
23 one of the grounds why pardon, sentence commutation applica-
24 tions are denied, is when a State's Attorney vehemently
25 opposes it because of communications he might have received

1 from the victim's family or for other reasons.

2 QUESTION: I understand that the liberty interest
3 you are asserting in this case would not even require that
4 the Board hold a meeting. Is that correct?

5 MR. WIZNER: I think that's true, except that --
6 I hesitate to say that it's true, again because of the
7 consistency with which relief has been granted. If you have
8 a situation as we do here where more than three-quarters and
9 perhaps as many as 90 percent of a particular small defined
10 class of inmates are getting relief, then it may be that they
11 have to have something more than just some superficial state-
12 ment of reasons when they are singled out for denial of that
13 relief.

14 That is not the system we have now. The system we
15 have now is that the Connecticut Board of Pardons grants
16 these kinds of hearings to anybody who applies to it, so I
17 have to assume that I'm operating within a system in which
18 anybody after he's served one year of a sentence may apply
19 for a sentence commutation and that the Board as a matter of
20 practice, deeply rooted practice over a period of some three
21 decades, has singled out one class of inmates to give a
22 very high level of relief to.

23 QUESTION: Isn't it true your 90 percent figure
24 is a little bit misleading because in any set of applicants
25 in one day, 90 percent of those don't get relief on that day?

1 MR. WIZNER: That's right. Our -- I want to be
2 very clear about what I'm saying about that, Justice Stevens.
3 Of persons convicted of murder or related crimes and serving
4 life sentences under a statute that was repealed in 1971,
5 sometime during the first 20 years of their life sentence
6 75 to 90 percent of them will have their sentences reduced
7 by the Connecticut Board of Pardons, and that's all that I'm
8 saying.

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

11 (Whereupon, at 11:55 o'clock a.m., the case in the
12 above-entitled matter was submitted.)
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CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1997

CONNECTICUT BOARD OF PARDONS ET AL.,

V.

DAVID DUMSCHAT ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY:

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