

In the

Supreme Court of the United States

HOYT WEAVER,

PETITIONER,

v.

ROBERT GRAHAM, GOVERNOR
OF FLORIDA,

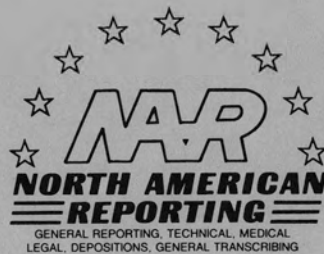
RESPONDENT.

No. 79-5780

Washington, D.C.
November 5, 1980

Pages 1 thru 38.

ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:
3 HOYT WEAVER, :

4 Petitioner, :

5 v. :

No. 79-5780

6 ROBERT GRAHAM, GOVERNOR :
7 OF FLORIDA, :

8 Respondent. :
9 -----:

10 Washington, D. C.

11 Wednesday, November 5, 1980

12 The above-entitled matter came on for oral ar-
13 gument before the Supreme Court of the United States at
14 1:00 o'clock p.m.

15 APPEARANCES:

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17 Tampa, Florida 33601; on behalf of the Petitioner.

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C O N T E N T S

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1 needed to do under the Florida statute, and I quote, was
2 "stay out of trouble." The time was earned each month.

3 QUESTION: And that was by statute?

4 MR. MacDONALD: Yes, sir. "The so-called new
5 law, Mr. Justice Rehnquist, they added the phrase, "at
6 beginning of each month." But if you read both statutes,
7 you will see in Subsection 1(c) of the so-called old law, or
8 first statute, that it is added each month. As a matter of
9 administrative convenience alone, when the prisoner is intro-
10 duced to the system, a so-called tentative expiration date
11 is calculated on the assumption that he would earn all of the
12 time. This is done under both statutes.

13 In 1978 Florida reduced the formula, the former for-
14 mula which was set out in brief as the so-called 5-10-15,
15 reduced to 3-6-9, a 40 percent reduction applied from January
16 1, 1979, forward. The effect of this upon my client is that
17 if he had earned all of the time under the old statute he would
18 have been required to serve only 8-1/2 years. Under the new
19 statute, 11 years. Thus the burden of the two years.

20 Upon petition by several pro se petitioners acting
21 separately to the Supreme Court of Florida, the ruling was had
22 which is now the subject of the petition before this Court.

23 Acting pro se, without oral argument, and I must
24 say, in candor, without discussion of the controlling authori-
25 ties enunciated by this Court in the past, the Supreme Court

1 of Florida held in effect that this Act of the Florida Legis-
2 lature was an act of legislative grace which of course is a
3 monumental begging of the question.

4 The establishment of the system in the first instance
5 is the act of grace. But the amendment, alteration, and change
6 is not an act of grace, and that was the issue not discussed.
7 That doctrine, of course, has been discredited in virtually
8 every state in which this issue has arisen, and in comparable
9 situations it has been discredited, we feel, by the decisions
10 of this Court. Once the state adopts an early release proce-
11 dure, be it parole or otherwise, it may not change it.

12 QUESTION: You suggest that a state could not
13 abolish parole entirely?

14 MR. MacDONALD: Not for those who are already in the
15 system, Your Honor, because that brings me immediately,
16 Mr. Chief Justice, to the classic definitions which the Court
17 has given to an ex post facto loss, it's the Calder case in 1798,
18 in which we speak of the critical time is the time of the
19 commission of the offense. Calder limits it to criminal cases
20 and a perhaps small area of penalties or forfeitures. Beyond
21 that the effective time is the date of the commission of the
22 crime. Thereafter, under Calder, adoption of a legislative
23 act which would allow a greater penalty is an ex post facto
24 law.

25 In 1883, for example, in Kring, the Court expressed

1 it slightly differently, stating that with relation to the
2 consequences of the offense, that which alters the situation
3 of the defendant or prisoner to his disadvantage, is a forbid-
4 den ex post facto law. We do not need to go to parole, pardon,
5 things of that type, because we are confronted here with gain
6 time, which the state again concedes, pages 5 and 6 of its
7 brief, gain time has the effect of determining the time of
8 confinement. And of course, confinement being the antithesis
9 of liberty, and the extension of it, or the diminution of it
10 obviously affects the penalty.

11 QUESTION: Your case really comes down to the propo-
12 sition that you expressed when you said, the state which had a
13 parole system could not abolish it with respect to prisoners
14 already convicted while that parole system was on the books.

15 MR. MacDONALD: That was our opinion, although of
16 course you would not reach that issue in this case. You're
17 only dealing with the gain time, but I would feel that that
18 would follow.

19 QUESTION: How do you distinguish?

20 MR. MacDONALD: There are some differences between
21 parole, obviously it being a much more subjective matter.
22 We have, for example, outlined in our brief the various types
23 of early release provisions which Florida does have and then
24 contrast it with the so-called statutory gain time, the time
25 off for good behavior with which we are concerned here,

1 and so-called --

2 QUESTION: What if Florida after the commission of
3 the offense but previous to the trial expanded the type of
4 information that could be used by the trial judge in sentencing
5 the defendant, if he were convicted. This new information
6 would be admissible under the new system but not under the old
7 system. Would that be a violation of ex post facto?

8 MR. MacDONALD: There are cases on that, Your Honor.
9 The question would be whether that ultimately amounted to a
10 procedural change or it would bring us to the fourth classi-
11 fication which is set out in Calder, that which changes the
12 testimony, or the nature of the testimony, to the point where
13 it would on the one hand insure a conviction and without it,
14 on the other hand, there would be no conviction. Then one
15 would have the fourth category in Calder.

16 So I would think the conflicting arguments to be
17 advanced on the one hand from your procedural change, which is
18 not ex post facto; on the other hand, a change of such signifi-
19 cance that it falls within the fourth category of Calder.

20 QUESTION: What if a state adopts a code of
21 evidence under the new code, after a given person has
22 committed a crime, before he is tried, before he is
23 charged with the crime. And in the new code there is
24 certain evidence which was previously
25 inadmissible which is now made admissible.

1 Is that ex post facto?

2 MR. MacDONALD: It might very well be under the
3 fourth definition of Calder, although there are some interest-
4 ing cases which we did not brief because I sought only to brief
5 those decisions of the Court which related to punishment.
6 This is the third category enunciated by Mr. Justice Chase.
7 There are, I would suggest to you, if it was clear that the ad-
8 mission of this evidence -- for example, the changing of the
9 nature of the testimony, which I believe is the phrase in
10 Calder -- for example, you'll find that quoted, Mr. Chief
11 Justice, on page 20 of our brief: "Every law that alters the
12 legal rules of evidence and receives less or different testi-
13 mony than the law required at the time of the commission of the
14 offense."

15 We need not go that far in this case. We contend
16 the case is almost squarely within Lindsey v. Washington,
17 a 1937 case, in which the Court held that that which had been
18 formerly a permissive sentence now made mandatory subsequent
19 to the commission of the crime was a forbidden ex post facto
20 law; followed by the per curiam affirmance of the three-judge
21 district court in Massachusetts in 1968 in Greenfield, which
22 held that there, subsequent to the crime, Massachusetts adopted
23 a statute which precluded parole violators from earning gain
24 time for the first six months after reincarceration, that also
25 being held a prohibited ex post facto law.

1 It's interesting to compare the result in that case
2 with this case. In Massachusetts the petitioner, Greenfield,
3 lost 100 percent of the opportunity to achieve gain time for
4 six months. In this case my client loses 40 percent for 12
5 years. And I've measured that in the brief, and I think you
6 can see the distinction in the materiality and the substan-
7 tiality of the burden imposed upon him. As I say --

8 QUESTION: Mr. MacDonald, may I just ask this one
9 question. I understand that generally the ex post facto cases
10 speak in terms of the date of the offense.

11 MR. MacDONALD: Yes, sir.

12 QUESTION: But would it not be more appropriate in
13 this case to focus on the date of the sentencing or the date
14 of the conviction, because --

15 MR. MacDONALD: Indeed it would.

16 QUESTION: -- as of the date of the trial the judge
17 could adjust or -- I mean, the fact that the offense occurred
18 before and then he was tried afterwards, I couldn't see there'd
19 be any unfairness.

20 MR. MacDONALD: Well, Mr. Justice Stevens, I could
21 not agree with you more. The distinction need not be made in
22 this case because the extending amendment comes not merely
23 after sentencing, but after approximately 2-1/2 years of acqui-
24 sition of time under the old formula. I may say, it's par-
25 ticularly significant and I agree with you completely, because

1 this comes as a result of a plea bargain. We cite in our
2 brief a number of remonstrances to trial judges in their
3 seminars; keep in mind what the man will really serve. We
4 all know that in the combative atmosphere of the criminal
5 justice system the ultimate -- to use perhaps an analogy
6 familiar in another situation, the bottom line in the criminal
7 justice system is, how much time must I actually serve? Not
8 what is written on the paper, but how long will I be there and
9 how long will I lose my liberty?

10 I think that that point could very well be made.
11 The problem, however, is that from the time of Calder, the date
12 of the crime --

13 QUESTION: Are you suggesting that the judicial
14 system, or the society must respond to what the convicted
15 criminal thinks about the whole problem, by that bottom line
16 suggestion?

17 MR. MacDONALD: Your Honor, in a plea bargaining
18 situation, one surrenders certain rights. This man pled guilty.

19 QUESTION: Well, does it make any difference whether
20 the person pleads guilty or is found guilty, for this purpose?

21 MR. MacDONALD: I think not for this purpose. I
22 simply point out that if one goes to reliance, if one deals
23 with the test enunciated by the Supreme Court of Florida, that
24 is, no vesting, no right of reliance, then one can make an
25 argument. Here there is, in this case, indeed reliance.

1 Of the--

2 QUESTION: Do you think that's --

3 MR. MacDONALD: Beyond that, I think -- if I might
4 pursue that just for a moment, the trial judge himself is en-
5 titled to rely upon it. Let us suggest that Florida abolishes
6 gain time January 1, 1979. The trial judge did not intend
7 for the man actually to spend 15 years, he measured it by the
8 law in effect at that time.

9 QUESTION: That's quite a different thing from what
10 the defendant expects or anticipates, isn't it?

11 MR. MacDONALD: Well, I think he is entitled, if the
12 Court please, when he enters into the judicial system, to
13 believe that the ex post facto clause means what it says and
14 that the law and rules cannot be changed. And I think to that
15 extent society should be concerned about what he relied upon;
16 yes, indeed.

17 QUESTION: Mr. MacDonald, straighten me out on one
18 detail. He was sentenced in '76 originally?

19 MR. MacDONALD: Yes, Mr. Justice.

20 QUESTION: The statute was changed in '78?

21 MR. MacDONALD: Yes, sir.

22 QUESTION: And what about the gain time that he
23 "earned" up to that time? Was that under the old system?

24 MR. MacDONALD: All right. That -- that -- yes, sir.
25 And that brings --

1 QUESTION: That was never taken away from him?

2 MR. MacDONALD: That's correct. It was not taken
3 away from him in the sense of recalculation under the new
4 formula. And that brings me directly to one of the answers
5 which the state gives. This is not retroactive because we
6 only take it from this day forward, we don't take that which
7 was already earned.

8 That is not even a good argument under Florida law,
9 and it's one reason that the Florida Supreme Court did not even
10 deal with it. Florida, for example, defines a retrospective
11 or retroactive statute as one which attaches a disability to
12 a prior act. And of course, obviously this does. This Court
13 in Kring, which I mentioned earlier, spoke of attaching
14 consequences to prior acts. This clearly is aimed at the
15 measure of punishment, and therefore is retroactive.

16 One is not in prison merely to acquire or to lose
17 gain time. One is there serving a sentence as a result of
18 criminal misconduct.

19 QUESTION: Well, how do you distinguish Dobbert,
20 then, because there in the new statute it was provided for a
21 minimum of 25 years, which the old statute had not provided?

22 MR. MacDONALD: Well, in Dobbert the Court did not
23 answer the question because the man was sentenced to death
24 and did not get the life sentence, but I think --

25 QUESTION: Well, but -- we still don't know how much

1 time your man has got, sir?

2 MR. MacDONALD: We know that he is losing this time
3 each month, Your Honor, from January 1, 1979.

4 QUESTION: Wasn't there some discretion?

5 MR. MacDONALD: The State says, the words under the
6 old statute were, "faithful, diligent, industrious, orderly,
7 and peaceful; good conduct." Under the new statute, "satis-
8 factory" and "acceptable."

9 QUESTION: Do you think it takes away the incentive
10 to behave himself in prison?

11 MR. MacDONALD: No, indeed, Your Honor. That comes
12 from the denial of the gain time for the lack of good conduct,
13 which is an entirely different matter. He also may forfeit
14 prior earned time.

15 QUESTION: But you're saying that he can behave all
16 he wants to, but he will earn less good time every day than he
17 did before?

18 MR. MacDONALD: That's correct. Yes, sir.

19 QUESTION: And hence he's been deprived of the
20 opportunity to earn 2X good time instead of X?

21 MR. MacDONALD: Yes, sir, because as a matter of
22 mathematics, he was in the ten-day-a-month category at the
23 time the statute went into effect. He is now in the six
24 days --

25 QUESTION: At the time he went into prison the

1 promise was, every day you're good you earn ten days?

2 MR. MacDONALD: Yes, sir.

3 QUESTION: And that promise was changed to every
4 day you're good you get five, or whatever the figure is?

5 MR. MacDONALD: Yes. That's this case.

6 QUESTION: That's one ground for your case?

7 MR. MacDONALD: Yes, sir.

8 QUESTION: What about if you take it from the time
9 of the offense, the promise, as we're calling legislative
10 enactments here, in Dobbert was that you were going to serve a
11 minimum of 25 years regardless under the new statute?

12 MR. MacDONALD: Yes, but the Court said, Mr. Justice
13 Rehnquist, that if in fact Petitioner Dobbert had not been
14 condemned to death but had been sentenced to the life imprison-
15 ment and had to serve the 25 years, my recollection is the
16 court said, there would be a very serious ex post facto ques-
17 tion. And I believe under the decided precedents -- in fact,
18 I would say that would be governed almost completely by Lindsey
19 v. Washington, which you distinguished in your opinion.

20 Remembering also that in that case Dobbert made
21 what I would regard as virtually a sophistry that he wasn't
22 governed by either statute because there wasn't a valid capital
23 offense statute in effect in Florida at that time.

24 It is argued by the State that there is no liberty interest
25 in unearned gain time, and therefore the ex post facto clause

1 is not applicable. In other words, if we do not reach proce-
2 dural due process in the cause, then we need not concern our-
3 selves with the ex post facto clause. I submit that those are
4 both mutually independent.

5 We mention such cases as Greenfield and Wolff v.
6 McDonnell in our brief to point out that the Court has held
7 in the past that gain time once acquired is a liberty interest,
8 and once you lose earned gain time for disciplinary reasons,
9 it must be done with certain minimal procedural due process.
10 My point in citing those cases is not to suggest this is a
11 Fourteenth Amendment case at all, but merely to point out that
12 by definition the right to acquire a liberty interest neces-
13 sarily affects liberty in the first instance, thus affects
14 punishment, and thus is within those cases which we cite under
15 the ex post facto clause.

16 QUESTION: What do you do about the Lindsey case?

17 MR. MacDONALD: Lindsey? I think Lindsey is clearly
18 in point in our situation, if the Court please.

19 QUESTION: And tell me why.

20 MR. MacDONALD: All right. It was a Washington
21 statute which provided, as I recall, the period was 15 years,
22 at the time of the commission of the offense.

23 QUESTION: It required a penalty of 15 years?

24 MR. MacDONALD: That was permissive. It was within
25 the discretion of the trial judge.

1 QUESTION: Well, what was the authorized penalty at
2 the time of the crime in Lindsey?

3 MR. MacDONALD: I recall it was 15 years. It was
4 within the sentencing range of the judge; subsequent to the
5 commission of the offense it was made mandatory. Forgive me
6 if I'm wrong about the number but the point is that what was
7 formerly the outer limit of his discretion became a minimum.

8 QUESTION: So what was he sentenced to, though?

9 MR. MacDONALD: My recollection -- I do not recall --

10 QUESTION: Wasn't he sentenced to 15 years?

11 MR. MacDONALD: Yes, he was. And the Court --

12 QUESTION: Now, here's a law that says, at the time
13 of the crime you can be punished up to 15 years. He is sen-
14 tenced to 15 years?

15 MR. MacDONALD: Yes, sir.

16 QUESTION: Then, the law is changed to 15 years?
17 Said 15 years mandatory?

18 MR. MacDONALD: But the Court said that it need not
19 inquire whether technically that was an increase in punishment
20 because it violated the statute; that he had the right to go
21 before the judge and receive consideration by a trial judge
22 who was not obliged to sentence him ten to 15 years, but he
23 might very well, under the former statute.

24 And I think obviously that's a much more ethereal
25 concept than the one my client --

1 QUESTION: You think that's different from Dobbert,
2 you say?

3 MR. MacDONALD: Well, that's what this Court held;
4 yes, indeed. Because he was sentenced to death, and so it made
5 no difference. It was purely theoretical. I think I have a
6 stronger case than Lindsey, and of course Dobbert had no case.
7 I would say quite briefly in closing --

8 QUESTION: Mr. MacDonald, before you close, do you
9 have any response to the state's argument that by virtue of
10 liberalizing the opportunities for extra gain time, that the
11 package as a whole is actually more --

12 MR. MacDONALD: Yes, Your Honor, I had just passed
13 that over because I saw my time was running out. I say, we
14 have printed in the reply, in the appendix to our reply brief,
15 a comparison of the former statutory gain time, the permissive
16 statutes which are not mentioned by the State, the administra-
17 tive rules which were adopted by the Division of Corrections
18 pursuant to those permissive statutes, which altogether per-
19 mitted my client both to have the benefit of the 5-10-15 formu-
20 la. That's substantially all. I don't believe that I quite
21 explained away the going to college or the disability, but
22 there's nothing on this record that shows that my client is
23 even qualified to do that, so I think that on the whole I have
24 made a case in our reply brief that what the state says is
25 simply not the case, and that the only change in the law is the

1 one which the Supreme Court of Florida says at the outset of
2 its brief opinion. The difference in this statute is we
3 formerly had a 5-10-15 formula; we now have a 3-6-9. That's
4 the question only. I think Florida should have kept its word
5 and that this petitioner is entitled to have his gain time
6 calculated from that day forward under the old formula.

7 Thank you.

8 MR. CHIEF JUSTICE BURGER: Mr. Allbritton.

9 ORAL ARGUMENT OF WALLACE E. ALLBRITTON, ESQ.,

10 ON BEHALF OF THE RESPONDENT

11 MR. ALLBRITTON: Mr. Chief Justice and may it please
12 the Court:

13 As I understand the issue urged upon this Court, it
14 is that the application of Florida's new gain time statute in
15 the computation of gain time makes the statute an ex post facto
16 law as applied to petitioner.

17 This same issue was rejected by the Florida Supreme
18 Court. As I understand it, the basis for the ex post facto
19 claim is that Section 944.275 permits the accumulation of a
20 lesser amount of gain time than did the old statute, Section
21 944.27.

22 The Respondent contends that Florida's new gain time
23 statute is not ex post facto, because it does not apply a new
24 punitive measure to a crime already consummated to the detri-
25 ment or material disadvantage of the wrongdoer. And I submit

1 to the Court that this is a necessary ingredient in order to
2 support an ex post facto claim, and this Court so held, I be-
3 lieve, in *Dobbert v. Florida*.

4 The statute is remedial and constitutes a procedural
5 change in the statutory mechanism designed for the purpose of
6 granting gain time to deserving prisoners. The statute
7 deprives petitioner of nothing that he has already earned.
8 and at this point let me urge upon the Court that I believe it
9 should be pointed out that under this Court's holding in
10 *Beazell v. Ohio*, that the prohibition against ex post facto
11 laws does not limit the legislative control of remedies and
12 modes of procedure.

13 I think this Court's decision in *Hopt v. Utah* ably
14 pinpoints the position of the respondent here, and I quote
15 very briefly. It says, "The crime for which the present
16 defendant was indicted, the punishment prescribed therefor,
17 and the quantity or the degree of proof necessary to estab-
18 lish his guilt, all remain unaffected."

19 And I submit to you that those same remarks could be
20 applied to the statute that is here under attack.

21 QUESTION: Mr. Attorney General, suppose the criminal
22 statute providing for the penalty said, the penalty for this
23 crime shall be 15 years, less any good time earned at the rate
24 of five days for every day of good behavior. I suppose you
25 would be here arguing the same thing, that the Legislature

1 after a fellow is sentenced under that provision, that the
2 Legislature could amend that penalty provision by saying, less
3 two days for every day of good behavior?

4 MR. ALLBRITTON: That's true, but Mr. Justice White --

5 QUESTION: Wouldn't your argument follow?

6 MR. ALLBRITTON: Yes, I would follow the same argu-
7 ment. I want to point out, sir, that your argument assumes
8 something that we do not have in this case at all. The statute
9 in this case, the gain time statute is no part of the sen-
10 tencing proceeding at all, none whatsoever.

11 QUESTION: I understand that.

12 MR. ALLBRITTON: All right, sir.

13 QUESTION: But nevertheless, nevertheless, if prior
14 to amendment the warden refused to give him good time for days
15 that he behaved, I suppose the warden would be in trouble,
16 wouldn't he?

17 MR. ALLBRITTON: He would be in trouble; yes. Be-
18 cause the man had earned it. He had earned the right, then;
19 absolutely. And he would have a colorful due process argument.

20 QUESTION: Well, the warden couldn't -- the warden
21 couldn't tell him in advance either that, well, you may have
22 earned a lot of good time up to date, but from here on you
23 don't earn any good time.

24 MR. ALLBRITTON: Justice White, you're assuming
25 things that I don't believe exist at all. I can't accept that.

1 I don't believe any warden is going to tell any prisoner that
2 at all.

3 QUESTION: No, I'm sure he wouldn't. He'd know
4 better.

5 MR. ALLBRITTON: I would hope so. Yes, sir.

6 QUESTION: Mr. Attorney General, you do recognize
7 that this man loses four days a month?

8 MR. ALLBRITTON: No, sir, I do not. I want to point
9 out that although the new gain time statute does reduce the
10 fixed amount of calendar statutory gain time from the fixed
11 formula of 5, 10, and 15, to 3, 6, and 9. However, sir, by
12 virtue of additional provisions contained therein, the new
13 statute provides greater opportunity to accumulate a greater
14 amount of gain time than did the old statute.

15 Now, let me illustrate this with just three examples.

16 QUESTION: But he still loses the four days?

17 MR. ALLBRITTON: Sir?

18 QUESTION: He still loses four days?

19 MR. ALLBRITTON: Not necessarily.

20 QUESTION: What you're saying is, although he loses
21 four days, he can get some more days out of something else?
22 Isn't that what you're saying?

23 MR. ALLBRITTON: More so; yes, sir. More than --

24 QUESTION: But you still admit he loses more than
25 four days?

MR. ALLBRITTON: He could lose four days. That's

1 true.

2 QUESTION: No, doesn't he lose four days?

3 MR. ALLBRITTON: Not necessarily. No, sir, I won't
4 admit that at all.

5 QUESTION: Can he get ten days like he did before?

6 MR. ALLBRITTON: Not under the statutory --

7 QUESTION: Can he get ten --

8 MR. ALLBRITTON: -- 5, 10, and 15; no.

9 QUESTION: So he loses four?

10 MR. ALLBRITTON: He can get it in other ways.

11 QUESTION: Sure. He can get it in a lot of ways.

12 He can --

13 QUESTION: Counsel, without these additional provi-
14 sions you'd still be making the same argument?

15 MR. ALLBRITTON: I'd still be making the argument
16 based primarily on the fact that under Florida law parole and
17 probation and gain time are a matter of legislative grace.
18 Just because we have that doesn't mean that a prisoner is
19 automatically declared to have a liberty interest therein.
20 We have it. It was given at the grace of the Legislature, and
21 it can be withdrawn at the grace of the Legislature almost at
22 will.

23 QUESTION: After it's given?

24 MR. ALLBRITTON: After it's given. But --

25 QUESTION: It can be withdrawn after it's given?

1 It can be withdrawn after it's given?

2 MR. ALLBRITTON: Just hear me out, please, sir.

3 It can be withdrawn, yes, because they didn't have to give it
4 in the first place. But in so doing they cannot deprive a
5 man of the gain time that he has already earned; oh, no. I'm
6 not arguing that and I don't wish to be understood that way at
7 all. They can withdraw it, but the gain time the man has
8 already earned, he cannot be deprived of that by a legislative
9 act. No, sir.

10 QUESTION: What do you do with -- what was the name
11 of that case, that your colleagues rely on here? Scafati?
12 What do you do about that case?

13 MR. ALLBRITTON: That case is an illustration
14 of what we spoke about just minutes ago. In the Scafati case
15 and under Massachusetts, the good time credits adhere in the
16 sentence imposed. After Scafati was sentenced and he went to
17 the penal institution, he was then paroled and he was returned
18 therefore because he violated the parole. Now then, in the
19 interim, in the interim, after Scafati was sentenced, if the
20 Court please, they passed a law which says that if a man is
21 paroled and violates the conditions thereof and is returned to
22 the penal institution, he is deprived of good time credits for
23 the first six months after his return.

24 QUESTION: So you're deprived of the right to earn
25 good time credits for six months?

1 MR. ALLBRITTON: Yes, that's it. Now, and since,
2 sir, the good time adheres in the sentence under Massachusetts
3 law, if the Court please, the original sentence imposed is
4 necessarily lengthened; has to be.

5 QUESTION: So you distinguish your case from Scafati
6 in saying that the good time statute was separate from the
7 sentencing statute?

8 MR. ALLBRITTON: Absolutely; absolutely. And that
9 is a marked distinction. There are two kinds of good time
10 statutes on the books, those which adhere in the sentencing and
11 those which are no part of it, just as this man here. The good
12 time statute in effect at the time he received his time in
13 1976 was no part of the sentencing proceedings whatsoever.

14 QUESTION: Isn't that a pretty theoretical distinc-
15 tion?

16 MR. ALLBRITTON: Beg pardon?

17 QUESTION: Isn't that a pretty theoretical distinc-
18 tion? I mean, if somewhere on the statute books is contained
19 a method for calculating gain time and it's changed during
20 the course of a prisoner's imprisonment, does it make any
21 difference whether it was in the sentencing section of the Code
22 or in some other, or in the penal institution section of the
23 Code?

24 MR. ALLBRITTON: Yes, I think it does.

25 QUESTION: It has to for you to win, doesn't it?

1 MR. ALLBRITTON: It makes it a very strong distinc-
2 tion, absolutely, sir; absolutely. Because if it adheres in
3 his summons, if the Court please, then he cannot be deprived of
4 it by an ex post facto law. But under the Florida law it does
5 not so do, and it does not apply retroactively. The statute
6 which is attacked here does not apply retroactively at all.
7 In fact, it gives the man more of an opportunity to earn gain
8 time than he had under the old statute.

9 And I'd like to point out, if I may, please, three
10 distinctions on this, because I think they are material.

11 QUESTION: Before you do that, if I may just be
12 clear on one thing. If I remember the Florida Supreme Court's
13 opinion, they don't rely at all on this particular argument
14 you're about to make, do they? They rely on the fact that the
15 State can reduce, change the formula in a way adverse to
16 the present -- So this is a separate argument; we don't
17 have the benefit of the Supreme Court of Florida's --

18 MR. ALLBRITTON: I don't think the Supreme Court
19 touched on that in the Harris case; no, sir. They did rely on
20 the fact that under Dear v. Mayo, Mayo v. Lukers, and other
21 cases, that under Florida law that probation, parole, and
22 gain time are a matter of legislative grace and can be changed,
23 modified, withdrawn, at any time, as long, sir, as they don't
24 deprive the man of anything that he has previously gained under
25 the old law. Now, that would be wrong. I'll admit that.

1 QUESTION: But when this law went into effect, the
2 minimum that this defendant could have received went up, didn't
3 it?

4 MR. ALLBRITTON: The maximum went down but the mini-
5 mum went up.

6 QUESTION: There's more discretion?

7 MR. ALLBRITTON: Yes, there is more discretion.

8 QUESTION: But it's discretion that can be used
9 against him as well as for him?

10 MR. ALLBRITTON: Yes, that's true. If he violates
11 the rules of the institution, gain time can be taken away from
12 him.

13 QUESTION: May I ask one other question on your
14 basic theory before we get to whether the package is better
15 or worse. Under your view that there's a difference between
16 gain time already earned, and gain time that would be earned
17 after the statute became effective, what if the man had after,
18 say, three years in prison, become eligible to be considered
19 for parole, but two weeks before his parole hearing was set
20 the new statute was passed saying, you don't become eligible
21 for parole unless you've been in for at least ten years, or
22 something like that, so he lost eligibility for parole, but
23 did not lose parole itself. Would that be retroactive or not?

24 MR. ALLBRITTON: No, sir, I don't believe so. I
25 think the Greenholtz case touches on that. A man doesn't

1 acquire a vested interest in parole just because there is that.

2 QUESTION: Till he actually gets it.

3 MR. ALLBRITTON: But now, if he is eligible, and
4 the requirements are not changed and the parole board applies
5 wrong criteria or impermissible criteria, then you have a
6 different case. But that isn't the problem with --

7 QUESTION: What about all this grace?

8 MR. ALLBRITTON: It is grace.

9 QUESTION: Well, why would he have any rights under
10 this last question you answered? Why would he have any rights
11 at all if it was grace?

12 MR. ALLBRITTON: Well, because even though it is
13 grace, the State gave the grace in the first instance.

14 QUESTION: And the State can take it away?

15 MR. ALLBRITTON: As long as they don't deprive him
16 of anything, they can; yes. As long as they don't deprive him
17 of anything.

18 QUESTION: Such as due process?

19 MR. ALLBRITTON: Due process or anything else.
20 Absolutely. But the man has a vested interest in parole.

21 QUESTION: Oh, ex post facto.

22 MR. ALLBRITTON: Then they can't deprive him of it
23 by saying we're going to withdraw the parole statute.

24 QUESTION: No, Mr. Attorney General, I just want to
25 know what articles of the Constitution do not apply to "grace"

1 matters?

2 MR. ALLBRITTON: All of the Constitution applies,
3 I'm sure, as you well know, Mr. Justice Marshall.

4 QUESTION: I'm not worried about what I know. I'm
5 asking you the question.

6 MR. ALLBRITTON: Yes, sir, the procedural due pro-
7 cess under the Fourteenth Amendment, that does apply to grace,
8 absolutely it does. It can be released in that way, if a man
9 by the withdrawal of that grace, he's been deprived of a
10 protectable interest.

11 QUESTION: Well, was this man with four days a month
12 withdrawn?

13 MR. ALLBRITTON: Yes. If you look to nothing more,
14 sir, than the rigid formula of 5, 10, and 15, as compared with
15 the new statute's 3, 6, and 9. If you look only to that,
16 you exclude everything else, then he loses; that's true.

17 QUESTION: Well, suppose I look at that plus the
18 reply brief of the petitioner?

19 MR. ALLBRITTON: Well, I hope you'll read mine too.
20 That's fine if you look at his reply brief, because that's all
21 he wants the Court to view is the reduction in the 5, 10, 15.

22 QUESTION: I said, all of what you said, plus that.

23 MR. ALLBRITTON: Fine, but it's my argument, and I
24 haven't yet been able to get it out, that by addition, by
25 virtue of additional provisions contained in the new statute,

1 that the man has a right to earn a greater amount of gain time
2 under the new statute than he had under the old. Absolutely.
3 And I'd like to give -- still like to give you three examples
4 of that.

5 QUESTION: But counsel, I come back again. Then
6 you are relying on these additional provisions?

7 MR. ALLBRITTON: Yes. I certainly am.

8 QUESTION: In other words you would not be here if
9 they were not present in your statute?

10 MR. ALLBRITTON: I would not be here making the same
11 argument that I am. That's true, sir.

12 QUESTION: Well, I wonder why you make this conces-
13 sion?

14 MR. ALLBRITTON: Sir?

15 QUESTION: I wonder why you make this concession.
16 Isn't your case just as strong in theory at least, without
17 these additional provisions?

18 MR. ALLBRITTON: It may be in theory, but as a matter
19 of fact, I'm afraid it would be not. Hopefully that it would,
20 that I could prevail on an argument that the gain time is a
21 matter of legislative grace, that the man didn't have any right
22 whatsoever to assume that this gain time statute in effect at
23 the time he was sentenced, was going to stay in effect and
24 not be changed.

25 QUESTION: Well, in essence, isn't your argument that

1 all that lies ahead after the change in the statute was an
2 expectation on which he may not rely?

3 MR. ALLBRITTON: That's all he has in support of
4 his argument here. It's all he has -- he's saying here, and
5 he has to say here, that he has a constitutionally protectable
6 interest in gain time to be earned at a given rate in the
7 future. He has to maintain that or else I don't see how he
8 can prevail in this Court. And under the case law that I
9 have in my brief, I don't believe that he has a protectable
10 interest under the Constitution. If he doesn't have a pro-
11 tectable interest, then against what is the ex post facto
12 clause supposed to operate? Against what evil is the ex post
13 facto clause supposed to protect him if in the first instance
14 he doesn't have a constitutionally protected interest?

15 I say to you that in that case he cannot be said
16 to have been placed in a materially more disadvantaged position
17 than he was prior to the passage of the new statute, if the
18 Court please.

19 QUESTION: Can I just ask you one of the -- an
20 admittedly extreme example so that I at least understand what
21 your argument or charge is.

22 Supposing he is sentenced to 15 years and the
23 Legislature has not provided any gain time at all, and he is
24 on the last day of his 15th year and the Legislature changes
25 the sentence of his crime to 20 years. And he goes to pick

1 up his stuff at the warden's office and the warden says, sorry,
2 you're going to have to serve an extra five years because
3 the Legislature just changed the statute. Would that be a
4 violation of the ex post facto clause?

5 MR. ALLBRITTON: Yes, it would, Mr. Justice Rehnquist.
6 It would indeed.

7 QUESTION: Let's modify that just to this -- suppos-
8 ing the statute said, your sentence shall be from one to 15
9 years and the warden, depending on how you behave in prison,
10 shall decide when you get out, within that range. And then
11 after he starts to serve, with no definite promise of when
12 he'll get out, a new statute is passed saying everybody in
13 that category must serve the full 15 years. Would that violate
14 the ex post facto law? He wouldn't have had any right to
15 get out when the statute was passed. It would be just like
16 this case, wouldn't it?

17 MR. ALLBRITTON: I think it would; I think it would,
18 yes.

19 QUESTION: It would be like this case?

20 MR. ALLBRITTON: It would, because that we're dealing
21 with something that is taking place at sentencing. That is,
22 the new law that you assume to be passed will have made the
23 imposition of the 15-year sentence mandatory, and that would
24 be harsher. I think that that would be ex post facto.

25 QUESTION: Let me just change it a little bit.

1 Instead of saying, serve 15 years, he gets out when the warden
2 ~~in fact could~~ parole him within the 15-year period, and then
3 later on you pass a statute saying, we don't have any more
4 parole.

5 MR. ALLBRITTON: I don't know what they'd do in that
6 case at all, I really don't. You can guess this way or that way,
7 but it's hard to say. I can't even predict what this Court is
8 going to do in the case. I'd like to point out one thing in the
9 new statute, and this, I think, is new in penology.

10 The new statute permits the accumulation of gain
11 time by any prisoner who because of age, illness, because he's
12 infirm, or for some other reason he cannot participate in a
13 work release program; now, even though he can't build gain
14 time in a work release program, he can still be given gain time
15 because the man is old. He's ill, and under the old statute
16 there was no comparable provision at all. And one more --

17 QUESTION: Is this man old or ill?

18 MR. ALLBRITTON: I don't know. I've never seen the
19 man.

20 QUESTION: Well, how can you claim that it'll help him?

21 MR. ALLBRITTON: I'm just pointing out that it could
22 help him.

23 QUESTION: If he gets ill or old --

24 MR. ALLBRITTON: Well, it can help him, yes.
25 I'm pointing out that the new statute has more generous

1 provisions in it than did the old. For example, you can go
2 to school. Now, I don't know whether he wants to go to school
3 or not; he may. But if he participates in an approved course
4 of education, this means that he can receive gain time there-
5 for, and under the old statute this could not have been done
6 at all.

7 I rely also on Singleton v. Shafer, Trantino v.
8 Department of Corrections. All of those cases are in the
9 brief that I have submitted to the Court and I write much
10 better than I speak, so I'll leave that with you at this time.
11 Thank you.

12 MR. CHIEF JUSTICE BURGER: Thank you, counsel. Do
13 you have anything further, Mr. MacDonald?

14 ORAL ARGUMENT OF THOMAS C. MacDONALD, JR., ESQ.,
15 ON BEHALF OF THE PETITIONER -- REBUTTAL

16 MR. MacDONALD: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 I only have a few brief points. Not only did the
19 Supreme Court of Florida not consider the so-called ameliora-
20 tive effects of this statute, I urge the Court to look at the
21 Appendix. You will find the response of the Attorney General
22 to the pro se petition. You'll find the argument wasn't even
23 made. And the obvious reason it wasn't made, is if you lay
24 them down time doesn't permit. Mr. Justice Marshall correctly
25 points out, the regulations, the permissive, general statutes,

1 which were merely incorporated together in a codification of
2 the new law, show that the difference is just what the Court
3 said, they changed the schedule.

4 Mr. Allbritton says my client has been deprived of
5 nothing. He has been deprived of the statutorily guaranteed
6 right to acquire gain time which the State says he could do,
7 "merely by staying out of trouble."

8 Now, let me go quite quickly to one of the points
9 raised by the questions of Mr. Justice White.

10 QUESTION: Before you do, Mr. MacDonald, apparently
11 there was another change, if I'm not mistaken, between the two
12 laws. One is that at least administratively the credit was
13 given right at the beginning and the provisional time of re-
14 lease was set right at the beginning. And then, under the
15 contemporary law, the credit is given only when it accrues, is
16 that right?

17 MR. MacDONALD: Your Honor, here's the situation on
18 that. Actually, there's still a third statute, and I don't
19 want to confuse things, but the ultimate effect of it was
20 that under the new law they add the word monthly in the early
21 portion of the statute. But if you will read Subsection 1(c)
22 at the end of the 15-day provision into the 9-day provision,
23 you will see that the gain time is credited each month. Under
24 both statutes the State still calculates the tentative date
25 because in the Supreme Court of Florida under the new law --

1 QUESTION: That's fine -- up front in quotations,
2 is it?

3 MR. MacDONALD: Yes, sir. They gave --

4 QUESTION: So in other words you make no point of
5 that?

6 MR. MacDONALD: No sir --

7 QUESTION: All right.

8 MR. MacDONALD: -- because there's no change.

9 QUESTION: That was my only question.

10 MR. MacDONALD: No, sir. Let me go very quickly.

11 Need it be a part of the sentence? I suppose that is tied to
12 the word "annexed" in the third category in Calder. First,
13 let me say, Mr. Justice Chase adds at the end, "or similar
14 laws." I know of no case that says they must be physically
15 tied the one to the other, that the judge must breathe the
16 words, you're sentenced to so many years subject to all of
17 the laws of Florida. If one so desires, I have cited in my
18 reply brief, the fact that indeed Florida biennially and
19 before this time, reenacts in its entirety all of its criminal
20 statutes -- all of its statutes, indeed. So they are enacted
21 at the same time.

22 Finally, I think the Court disposed of that point
23 in the Lindsey case which we discussed earlier, because
24 it said we need not go to the question of whether this is tech-
25 nically a change in the punishment annexed. And let me finally
say that if that is the law of Florida, then Florida can change

1 all of its sentences, because Your Honors can look at the
2 Florida statutes and see that it merely provides that murder
3 is a certain type of felony, burglary is a certain type of
4 felony, and all of the punishments are somewhere else.

5 QUESTION: I'm just curious, do you practice criminal
6 law?

7 MR. MacDONALD: No, I do not, Your Honor. I do
8 corporate and antitrust litigation.

9 QUESTION: I'm just curious. How did you come
10 across the Scafati case?

11 MR. MacDONALD: The Scafati case? I found it by
12 first finding it in the district court opinions and then find-
13 ing the per curiam affirmance. I believe Your Honor noted in
14 that case that you would have granted oral argument as op-
15 posed to --

16 QUESTION: And you found that -- you were looking
17 through. Did you look -- were you looking in Lexis for the
18 district court cases --

19 MR. MacDONALD: We had Westlaw, Your Honor.

20 QUESTION: The Westlaw, and you found the district
21 court cases included in Scafati --

22 MR. MacDONALD: Yes, sir.

23 QUESTION: And then went to Westlaw, and it said
24 there, affirmed?

25 MR. MacDONALD: Yes, sir. Now, I found that in that

1 the law which provided that henceforth parole violators who are
2 reincarcerated would lose the right to acquire gain time for
3 the first six months of the reincarceration. The statute had
4 a savings clause. It saved its effect for all those out on
5 parole. It did not save it for those in prison but not yet
6 on parole. The Commonwealth made what I thought was a rather
7 good argument that by thereafter accepting parole Scafati
8 in effect was bound by the laws of the time of the parole.
9 The three-judge district court rejected that argu-
10 ment and cited many of the cases which we cite and so held in
11 that case.

12 QUESTION: Like what? Do you think there are cases
13 other than Scafati in this Court --

14 MR. MacDONALD: Yes.

15 QUESTION: -- that hold squarely on this one?

16 MR. MacDONALD: I think Lindsey does, and I think
17 then one must go back to the more generalized pronouncements
18 which take us back to Kring, Cummings, and all the way back to
19 Calder, as to the nature of punishment. But I think Lindsey
20 and Scafati are the closest and finally, as I say, virtually
21 every state court which has passed upon this has held in our
22 direction. Thank you very much.

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

25 (Whereupon, at 1:55 o'clock p.m., the case in the
above-entitled matter was submitted.)

CERTIFICATE

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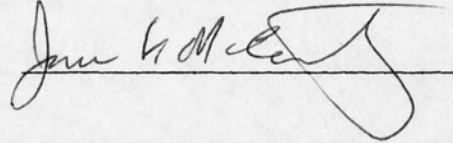
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