OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MICHAEL J. CAVANAUGH, EXECUTIVE DIRECTOR, SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES, ET AL.,

Petitioners v. GARY LEE ROLLER

CASE NO: 92-1510

PLACE: Washington, D.C.

DATE: Monday, November 8, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL J. CAVANAUGH, :
EXECUTIVE DIRECTOR, SOUTH :
CAROLINA DEPARTMENT OF :
PROBATION, PAROLE AND :
PARDON SERVICES, ET AL., :
Petitioners :
v. : No. 92-1510
GARY LEE ROLLER :

- x

Washington, D.C.

Monday, November 8, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

CARL N. LUNDBERG, ESQ., Chief Legal Counsel, South Carolina Department of Probation, Parole and Pardon Services, Columbia, South Carolina; on behalf of the Petitioners.

W. GASTON FAIREY, ESQ., Columbia, South Carolina; on behalf of the Respondent.

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PROCEEDINGS

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 92-1510, Michael Cavanaugh v. Gary Lee Roller.

Mr. Lundberg, Mr. Fairey, the Court would like to hear a discussion of what mootness problems may be raised by the statutory amendment that you have called to our attention.

ORAL ARGUMENT OF CARL N. LUNDBERG

ON BEHALF OF THE PETITIONERS

QUESTION: Mr. Lundberg, before you start, when was the South Carolina statute passed, the statute that raises this issue?

MR. LUNDBERG: The statute was passed in June of this year, but we didn't know about it, my colleagues and I, nor the corrections community, nobody was aware of it until Friday of this past week.

QUESTION: Well, you come in here with a four and a half month old statute and present it to us the eve of argument. You surely don't practice law that way in South Carolina, do you?

MR. LUNDBERG: No, Your Honor, but in South Carolina this past legislative season we had a massive restructuring of state government and we had a large number of laws -- I have a copy on my desk that was the

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earliest draft I could get of this classification bill, and on the draft that I have it doesn't have this provision in it. We have checked up on that on Friday to find out how it got added, and it was added in the conference committee but copies of the bill were not available for us to see until the advance sheets came out.

So I had no knowledge of it, although I had looked at the draft that I had of the classification bill. Mr. Fairey wasn't aware of it, nor was my co-counsel. One of our colleagues at the Attorney General's office had gotten a copy of the advance sheets, had taken it home and was reading it, and noticed that provision and the application to this case and called.

QUESTION: Other states I think have daily legislative service that enable lawyers to keep up with what is going on in the legislature. It is a little awkward to have as old a statute as this come in here the day before we argue.

MR. LUNDBERG: Yes, Your Honor, it was very awkward for me too. I made every effort to keep abreast of this statute that was available to me at the time, including computerized access at the legislation, but it wasn't physically available for me to read. It was a very unusual legislative year and I can't offer any other explanation to that other than that we were diligent to

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keep up with this law.

QUESTION: Now that you're here, is the 1983 aspect of this suit at least still alive?

MR. LUNDBERG: Your Honor, it's our position that until January 1 of 1994 all the issues are alive in this case. As of January 1 of 1994, when this new legislation goes into effect, it will then retroactively on the one section make this case moot as to the rescheduling of parole consideration hearings. But it is live on the issue of whether or not the Ex Post Facto Clause, today it is live on the issue of whether or not the Ex Post Facto Clause applies to parole procedures and the interval between parole consideration hearings in the first place.

QUESTION: I wonder how much of a practical help -- that is ordinarily a case that is argued in the November arguments probably would not be decided until after January 1 here, so that we're talking not just about today, but we have to talk too about the possibility of our Court not having finished its work on the case until after the first of January.

MR. LUNDBERG: Yes, Mr. Chief Justice. This case is not one which I can say could not necessarily be repeated because it involves the procedure involved in paroling procedures in general, and so I assume that some

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place along the line that a paroling procedure case could again come up in front of this Court, but a case such as this particular one might not be able to be raised and therefore maybe mootness could be, wouldn't be an objection to this Court making a decision on it.

QUESTION: And that's our test, isn't it? It has to involve these particular parties, the possibility of repetition, not just repetition of the issue against the South Carolina authority?

MR. LUNDBERG: That's true, Mr. Chief Justice, and in addition, since there has been no publicity, no one in the corrections field, no one in the probation field, no one in the general public, as strange as it may seem, has had an opportunity to be aware of this particular piece of legislation, and now that the advance sheets are out it may be that the general assembly will find some concern about the effect of this legislation and it may be that they will be altering the legislation in the near future.

QUESTION: May I ask, just to have a better understanding, you mentioned the conference committee apparently amended the legislation at the last minute. Was the amendment to which you referred subsection (b), subparagraph (b) of section 8, the one that says that it refers to the time of commission of the crime?

MR. LUNDBERG: No, Your Honor, the amendment that I referred to was in the section that made it active, that's section 266 that says that the retroactive effect of 16-1-60(b), that that section will be retroactive. The law that came in had the amendment that brought in 16-1-60(b) that changed the definition of a violent crime, the offender to whom would be considered a violent offender. But then the part that was stuck in was stuck in in 266 to make that one specific section retroactive, where the rest of the statute was prospective. That was the part that I was unaware of, was the retroactive.

QUESTION: Is it possible in your view that the purpose of doing that was to take care of this very litigation because we had granted cert in the case, or at least the Fourth Circuit had decided the issue?

MR. LUNDBERG: I can't answer what's in the mind of legislature, but I doubt very seriously that it was in their mind or that they were even aware of it.

QUESTION: I take it that in fact he has not had a hearing this year?

MR. LUNDBERG: That is correct, Your Honor. He has not had a hearing this year.

So, the questions that have been presented here in this case for review are whether or not the change in the interval between parole consideration hearings from 1

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year to 2 years, which came after the respondent's crime, violates the Ex Post Facto Clause, and whether or not the respondent's claim is cognizable under section 1983 instead of under habeas corpus.

The change in an interval between a parole consideration hearing from 1 year to 2 years does not violate the Ex Post Facto Clause. The change involves a part of procedure that is involved in the parole decision making process. In other words, in South Carolina this is a change which is involved in a form of clemency in the State of South Carolina.

QUESTION: Would there be any limit of time to the correctness of your statement if they decided, for example, there would be a hearing only every 20 years? Would that make any difference?

MR. LUNDBERG: Under the proposition that I am saying, I think that it would not make any difference because if the Ex Post Facto Clause does not apply, then it would not make any difference in terms of an ex post facto analysis of whether or not there was a hearing in 1 year or 20 years.

The Fourth Circuit's reasoning making the change in the interval between parole consideration hearings a violation of the Ex Post Facto Clause presents a large number of other problems for a state such as South

Carolina. For example, would an increase in the board size constitute a violation of the Ex Post Facto Clause, or would a change from a majority vote to a 2/3 majority vote violate the Ex Post Facto Clause, or what about a smaller change like from 21 months to 2 years violate the Ex Post Facto Clause?

It is my position that none of these changes, including a change from 1 year to 2 years in the frequency of parole consideration hearings violates the Ex Post Facto Clause.

QUESTION: Mr. Lundberg, suppose the statute, suppose you had a statute that said anyone convicted of a crime will be eligible for parole after 1 year, and then the statute is amended to say that person will be eligible for parole only after 10 years. Would that be, if applied retroactively would that be a violation of the Ex Post Facto Clause?

MR. LUNDBERG: Well, Your Honor, the position that I am taking is that the Ex Post Facto Clause does not apply to the scheduling between parole consideration hearings, and the logical extension of that position is that the Ex Post Facto Clause does not apply to parole eligibility period.

QUESTION: Period.

MR. LUNDBERG: Period. And the case that I rely

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on from this Court is Collins v. Youngblood. In Collins v. Youngblood this Court said, in reaffirming the Beazell case, Beazell v. Ohio, that to the best of this Court's understanding it correctly reflected the original understanding of the Ex Post Facto Clause. And that understanding, as we all know, involves that you can't make a crime that was, make an act which was innocent a crime after the fact or increase the punishment or make more burdensome the punishment or change the rules of evidence in such a way as to --

QUESTION: Why doesn't this make the punishment more burdensome when one is eligible for parole after a period of time and later on he's not eligible. Isn't that a more burdensome punishment?

MR. LUNDBERG: No, the punishment that is prescribed in the statute is for a fixed number, is for whatever is allowed in the statute. In this particular case the respondent had a 35-year sentence. That sentence was pronounced by the legislature. What is going on in the paroling process is a form of clemency, but this Court has said on a couple of occasions that the paroling process does not change the sentence.

In Lindsey v. Washington an argument was made involving an indeterminant scheme of sentencing and then a change to a fixed sentence, and since the fixed sentence

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was the same as the maximum in the indeterminant sentence the state took the position that there was no violation.

QUESTION: Would you go so far as to say that if a state had, say a 30-year sentence for a particular crime for everybody and at the end of 1/3 of the sentence the person was eligible for parole and routinely parole was granted, they then abolish parole entirely so that everybody has to start serving their full 30-year sentences, what would you say in that case?

MR. LUNDBERG: Your Honor, I would say that the sentence, if it were 30 years, remains 30 years, and the fact that the situs of the service of the sentence might change doesn't change the sentence. The paroling process doesn't change the sentence, and you have said that in this Court on a couple of occasions. You also made that mention in a parole guidelines case of Portley v. Grossman where you said that the change in the paroling guidelines, even though it kept the person in jail longer, that it did not implicate the Ex Post Facto Clause and it wasn't a violation of the Constitution.

QUESTION: Mr. Lundberg, do I understand correctly that the South Carolina Supreme Court now agrees with the Fourth Circuit and has rejected your argument on the merits?

MR. LUNDBERG: You do understand correctly.

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QUESTION: And was the legislation, the recent legislative change in South Carolina, responsive to the South Carolina Supreme Court's decision?

MR. LUNDBERG: No, it was not. The legislation took place in June, the decision of the South Carolina Supreme Court took place in August, and the South Carolina Supreme Court decision was based on no independent state ground. It solely relates to the fact that the Federal circuits had taken this position and so they followed the Federal circuit and changed the South Carolina law.

QUESTION: South Carolina was following what they took to be the meaning of the U.S. Constitution based on what the Fourth Circuit said.

MR. LUNDBERG: That's my interpretation of the case, Your Honor, yes. That's what I think was done in the Griffin case.

QUESTION: But the legislative change in fact came first?

MR. LUNDBERG: That's correct. But as hard as it may be to believe, no one saw the legislative change except those people who were physically involved in the writing up of it.

QUESTION: The South Carolina Supreme Court was not aware of the legislative change as far as you know?

MR. LUNDBERG: To the best of my knowledge that

is exactly correct, they were not aware.

QUESTION: Mr. Lundberg, do you have any comment about Akins against Snow in the Eleventh Circuit?

MR. LUNDBERG: Yes. The Akins case v. Snow I think has been, there are two problems with that. One of them is a question of whether or not the Ex Post Facto Clause applies at all. The second problem is that in the Akins case the Eleventh Circuit took the position that the Georgia statute, the way it was written made the interval between parole considerations a part of parole eligibility, and then took the position that the Ex Post Facto Clause applies to parole eligibility and since the Georgia statute intended to make the interval between parole considerations a part of parole eligibility, that it viclated the Ex Post Facto Clause and they struck it down.

The problem for all of these cases, the Snow case, Akin v. Snow, and a large number of other cases is that the circuits are not in agreement and there is disagreement between the district courts and the circuit courts, the courts of appeal, and between the courts of appeal. If this Court were to take a clear statement and say whether or not the Ex Post Facto Clause applies at all to these parole eligibility procedures, this problem would be resolved and we wouldn't have these kinds of cases.

That's the position that I am taking here.

Another thing in the Collins case, in the concurring opinion to the Collins case this Court set forth a test that might be looked at to determine whether or not a procedure actually violated or implicated the Ex Post Facto Clause. That test is this, that you look at the procedure from the time when the act was committed, and if that procedure changes the obtaining of a valid conviction or sentence then the Ex Post Facto Clause is implication. From there the analysis would go to whether or not there was a substantial disadvantage.

Well, when you do that, if you go back to the time when the respondent committed his crime and you look at the procedural change, the change in the frequency between parole consideration hearings hasn't got anything to do with obtaining a valid conviction or the sentence. His sentence is not altered by whether or not he has gained parole. He has -- in this state he has absolutely no expectation of parole. That is part of his argument that he says makes him go into 1983, is the fact that -- but he hasn't shown any entitlement to a fixed hearing date. There is no constitutional protection.

This Court said in the Greenholtz case, Greenholtz v. the Inmates of Nebraska Penal Commission, this Court said that there was no constitutional right nor

inherent right to be released conditionally prior to the expiration of a sentence. And so the position that this Court has taken all the way through, I have been unable to find, nor have I seen anything cited in this case, in the jurisprudence of this Court anything that is contrary that in anyway would implicate the Ex Post Facto Clause in this analysis.

QUESTION: How about Weaver against Graham?

MR. LUNDBERG: Weaver against Graham was a, although they used the term gain time, it was a good time credit scheme. It involved an automatic scheme whereby a person would be, his sentence would be shortened. The legislature replaced that scheme by putting in a discretionary good time credit scheme, and even though the amount of good time credit might have been greater under the discretionary scheme it required affirmative acts on the part of the inmate. Under the prior scheme it required no acts, and the result was that their sentence in absolute terms would be shortened.

So this Court held that the Ex Post Facto Clause was involved, but again we're talking about an actual reduction in sentence whereas with paroling in South Carolina, if you are granted parole it is not a reduction in sentence. It is a form of clemency. They still have to be supervised by the state. The purpose of paroling

has nothing to do with punishment. It's an administrative, executive type of a program.

QUESTION: Are you saying in effect that while you're on parole in South Carolina you're still, you're serving your sentence still?

MR. LUNDBERG: Yes, Mr. Chief Justice, you continue to serve your sentence. It doesn't accelerate the sentence satisfaction. There is no benefit to being on parole except having a change in the situs of the place of service of the sentence. And it is a form of clemency.

QUESTION: Well, as a practical matter it's certainly a benefit because you're able to walk around and so forth rather than be confined.

MR. LUNDBERG: I agree with that, Mr. Chief Justice, but every change, every procedural change that takes place, assuming that there was a violation, the Ex Post Facto Clause was implicated, doesn't necessarily mean that it's addressable or actionable. Dobbert v. Florida is a case that makes that point, and there are others from this Court that have made that point.

So the threshold problem is whether or not the Ex Post Facto Clause applies at all. If the Ex Post Facto Clause does apply, then you've got to address the question of whether or not this respondent can bring the action under 1983 rather than under the Ex Post Facto Clause.

Preiser v. --

QUESTION: Staying with your ex post facto, with the merits point, do I grasp your position on mootness correctly that if you were here after January 1 there would be no argument that you could make that this case is not, that the question on the merits is not moot?

MR. LUNDBERG: Yes, Your Honor, that is correct. After January 1, assuming no legislative change, I have no argument to make.

QUESTION: In a practical sense, when would he be entitled to his next hearing had the statute been in effect all along, the 1-year provision been in effect?

MR. LUNDBERG: He became eligible for parole, Your Honor -- and I don't know, that's another point. This statute that affected the frequency of hearing went into effect before he became eligible for parole, but after his sentence. He was heard originally in 1990 and the 2-year statute was applied to him and he was heard again in 1992. The Griffin case came down in August and the department is in the process of scheduling all the hearings for all people affected by the Griffin case.

QUESTION: So under a 1-year cycle sometime in 1993 he would be receiving his next hearing?

MR. LUNDBERG: Assuming that administratively they have enough spaces to get him heard.

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QUESTION: Assume we didn't decide the case for 6 months for some reason, we got slow about our work or something. Isn't it true that under the prevailing ruling of both the Fourth Circuit and the state supreme court you would have to give him his hearing in 1993, wouldn't you?

MR. LUNDBERG: Yes, I think we have to give him his hearing. We haven't been told that we have to give it to him on a fixed particular date. I think administratively --

QUESTION: It has to be within 1993.

MR. LUNDBERG: To do our best to comply with the court's order, that's correct, Your Honor, and administratively we're in the process of trying to accomplish that. But practically speaking, because of the way that the paroling system is administrated, they are scheduled, as I speak they have every case set up clear through May of 1994 right now. They have booked in all their cases through that time.

QUESTION: And I take it so far as these practicalities are concerned the same would be true if we came down with a decision against you tomorrow morning?

MR. LUNDBERG: Yes, Your Honor, that's true.

QUESTION: You wouldn't move it up just for us?

MR. LUNDBERG: Well, I think we would, Your Honor. I mentioned --

QUESTION: And not for the South Carolina Supreme Court?

MR. LUNDBERG: Well, we have done our best to comply with the order, but the way, unless we have more resources we just physically don't have the time. We literally, I checked this before I came up here, they have every single space available, they hear like 60 cases in a day and they have every single space booked up through May and they are starting to book into the subsequent months. So they would have to put on more, have more hearings than they presently have, which means they'd have to have more money, which means they'd have to go back to the budget and control board and follow those matters from a practical point of view in order to provide more hearings. But within the resources --

QUESTION: Mr. Lundberg, do you have any opinion as to whether if we were to decide this case is not moot and were to reverse the judgment of the Fourth Circuit and say that is not the law under the Federal Constitution, would the South Carolina Supreme Court then follow our view, do you think?

MR. LUNDBERG: Well, I think so. Also I think that the South Carolina case was decided exclusively on --

QUESTION: That's what I mean.

MR. LUNDBERG: -- on Federal grounds, and so I

think the decision by this Court reversing that would necessarily, we would ask them to review it if they didn't automatically on their own review it.

QUESTION: Does South Carolina have a parallel provision in its state constitution prohibiting ex post facto laws?

MR. LUNDBERG: It does.

QUESTION: In the earlier litigation did the litigants argue both issues and then the South Carolina court just chose to rest it on the Federal grounds?

MR. LUNDBERG: The applicant raised both constitutions in his original pleading in the Roller case. In the Griffin case I don't know the answer to that. So I can't answer in the Griffin case whether the state constitution was raised or not.

If this Court were to go forward and find, I don't think that you should find that the Ex Post Facto Clause applies, but if you did then I think that the Fourth Circuit's case has to be reversed because there's no entitlement to a hearing and the scheduling, there is no loss of meaningful opportunity to be considered for parole under this particular change. And if that is going to be determined to be a right, going from 1 year to 2 years has not deprived Mr. Roller of a meaningful opportunity to be considered for parole within his

sentence.

That's the reason that we have a scheme that provided for 2 years for violent offenders, because they have longer sentences and it takes, having a hearing every year is not necessarily productive and from the state's management point of view of its resources they don't want to do that. And in fact before the general assembly changed the procedure persons in Roller's situation would have had to wait 2 years.

If this Court were to feel that this was to be a moot issue, we feel that under United States v. Munsingwear that the Fourth Circuit's case ought to be vacated so that it wouldn't leave a bad precedent on a moot issue.

QUESTION: If extraordinary circumstances come to the attention of the parole board can they give a hearing under the old rule sooner than 1 year, or sooner than 2 years?

MR. LUNDBERG: No, Your Honor, they are fixed into 1-year or 2-year intervals following a rejection. If the person is revoked there is no procedure set by the general assembly and the parole board sets its own procedure. It is 1 year following a rejection, 2 years following a subsequent rejection on the same sentence. But there is no provision to expedite hearings other than

if they would create one, but they don't have anything in their board manual for expediting hearings.

I'd like to reserve the rest of my time if there are no further questions.

QUESTION: Very well, Mr. Lundberg.

We'll hear from you now, Mr. Fairey.

ORAL ARGUMENT OF W. GASTON FAIREY

ON BEHALF OF THE RESPONDENT

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

First as to the mootness issue, I find myself somewhat torn. We were successful in the Fourth Circuit. This was a pro se complaint by a prisoner who was denied parole initially and then told rather than the 1-year period he had to wait for reconsideration he had to wait 2. He then brought a habeas, excuse me, a 1983 action in district court, pro se, lost. Appealed it pro se to the Fourth Circuit. The Fourth Circuit called and asked would I consider being appointed and take the case on his behalf.

The Fourth Circuit found that the change from the 1 year to the 2 year violated the Constitution. That conflicted with a South Carolina Supreme Court case called Gunter in which both the state and the Federal Ex Post Facto Clauses were considered and found that that 1 to 2

year change was not a substantive change, therefore it did not violate the Ex Post Facto Clauses. The Fourth Circuit, as I said, reversed, and that is how we are here now.

Since that reversal by the Fourth Circuit certain things have occurred which have been initiated by the state, by both the legislative branch of the state and the judicial branch of the state. Only the executive branch of the State of South Carolina has not accepted the judgment of the Roller court of the Fourth Circuit as to ex post facto and the statute.

First the legislature, as we have found out, has amended the statute and in effect accorded all individuals sentenced under the old scheme their rights consistent with the ruling in Roller. Secondly, the South Carolina Supreme Court reconsidered their ruling in Gunter in Griffin. And they did not feel compelled to do so, they were aware at that time that Roller was pending before this Court. As a matter of fact the state petitioned for rehearing based upon this case.

The South Carolina Supreme Court specifically held that they were convinced by the ruling in Roller that it was consistent with their understanding of what ex post facto, at least now what ex post facto means. That case was brought and the ruling was consistent with both the

state and the Federal Constitution. As a matter of fact, they used the little case ex post facto rather than the Ex Post Facto Clause usually used when referring to the constitutional provisions.

So it is our position that while this case may be moot or close to moot, it is done by the state and the usual remedy applicable that the state has cited, the Munsingwear case and the Los Angeles v. Davis case, is not appropriate for this case.

QUESTION: That may be so when we're dealing just with an executive decision to turn something on or off, but now that there's a legislative change by the South Carolina legislature do you have any precedent that says when the legislature change that exception to mootness applies, that is for voluntary cessation?

MR. FAIREY: Justice Ginsburg, maybe I'm not being clear. It's not that I don't think the case may be moot. It's the usual remedy of this Court I don't think is appropriate under these circumstances. In Munsingwear this Court indicated that if one party takes steps to cause the ending of the case, they can't complain when it is used against them in res judicata. Here the state has accepted the ruling of the Fourth Circuit, both the executive and the legislative. Now they want to make this case moot, yet they want no precedent against them.

The usual remedy is to remand to the Fourth Circuit and to order them to dismiss the action as if it never occurred, which obviously would have no precedential effect if the South Carolina legislature were in February to decide to change the law back. Mr. Roller, unless the South Carolina Supreme Court were to indicate that it was based upon, their ruling was based upon the state constitution, would be back in the same position again.

QUESTION: Why couldn't the South Carolina Supreme Court say although the Fourth Circuit's judgment in Roller has been vacated because of mootness, we found it persuasive before and we still find it persuasive. We are going to stick to our opinion in Griffin.

MR. FAIREY: They very possibly could, Mr. Chief Justice, but there is no guarantee they would. And I think the precedent of having a party to a lawsuit being able to avoid losing, in effect, by simply mooting the issue, I think is a dangerous one.

QUESTION: But the South Carolina Supreme Court was not bound by what the Fourth Circuit said, so if it followed it it was only because it was persuaded by the reasoning of the Fourth Circuit, and that same reasoning would stand even if the Fourth Circuit decision is vacated. That is the South Carolina Supreme Court has already adopted that reasoning, it is part of its own

jurisprudence.

MR. FAIREY: Yes, Justice Ginsburg, I agree. But if this case is going to be mooted because of the legislation as opposed to the judgment of the South Carolina Supreme Court, then it is the state adopting the ruling -- in other words, Mr. Roller won in the Fourth Circuit. The state has accepted that, yet they don't want precedent to that effect. My understanding under other precedent of this Court is that just the ruling by the South Carolina Supreme Court when they were not absolutely clear whether it was under the Federal or state Constitution does not moot out this case. Only the legislation would do that. The legislation is subject to change, obviously.

QUESTION: Mr. Fairey, you don't cite the case of Akins against Snow. Your opponent cites it both in his main brief and in the reply brief, struggles with it, perhaps successfully, perhaps not. Do you have any comment on it?

MR. FAIREY: Akins v. Snow I think is along the same principle as the ex post facto in this case. We view ex post facto in -- we think, like Collins does, that ex post facto is either there or it is not. It is not a relative thing. To that extent I agree with the state.

QUESTION: An argument could be made that is

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precisely the same as this case except 7 years against 1.

MR. FAIREY: Exactly. And as a matter of fact the Fourth Circuit said that and quoted I think Thoreau, "as if you could kill time."

QUESTION: That's rather a slippery slope, isn't it?

MR. FAIREY: If you're going to take that analysis I think it is. Our position is that a 1-year change is just as violative of ex post facto as an 8-year change, that any change in the quantum of punishment, whether it be small or large, violates the Constitution. The issue -- and I think I understand where the state is coming from. They are saying in effect that since you're not guaranteed parole you have no, let's say liberty interest. South Carolina statute clearly is not similar to the Greenholtz or to the Allen statute where you must be paroled. It says you may be paroled. And there may not be a liberty interest in the release on parole.

But the issue is not that. The issue is whether or not there is a right to the consideration of the parole, is how we see it. It is similar to a judge sentencing someone.

QUESTION: Well, I recognize the issue, but I am not sure you have distinguished the case. But go ahead.

MR. FAIREY: Well, Justice Blackmun, I wouldn't

try to distinguish Akins v. Snow. Akins v. Snow we feel like supports our position.

But the sentencing judge has discretion to sentence within guidelines. In South Carolina in most cases they have from probation to the maximum sentence. Due process doesn't come in unless they violate, go outside that range. Similarly, a parole board has that similar discretion. They have a minimum range which is when someone becomes eligible for parole, and then they have a maximum range, the conclusion of the sentence.

QUESTION: Mr. Fairey, if you prevail here I suppose the next case will be that some change adverse to the prisoner in a case of administrative segregation within the prison violates the Ex Post Facto Clause. Do you think that can be distinguished from parole?

MR. FAIREY: Yes, Mr. Chief Justice, I think it can.

QUESTION: How?

MR. FAIREY: Depending upon whether that has an effect upon the length of sentence the individual is subject to incarceration.

QUESTION: Well, your opponent says that parole has no effect on the length of sentence, that the sentence technically remains the same. Granted, he is free to walk around. I suppose the same argument could be made that

someone in administrative segregation, though they are serving the sentence the same, is not nearly as free as someone who is outside of administrative segregation.

MR. FAIREY: That issue I believe, Mr. Chief Justice, has been considered by this Court and rejected.

QUESTION: In what case?

MR. FAIREY: In a series of cases, I believe. In Olin -- I have them here somewhere, but there's a series of cases where --

QUESTION: I think that was based on the entitlement argument --

MR. FAIREY: Yes, Your Honor.

QUESTION: -- not on the Ex Post Facto Clause.

MR. FAIREY: Yes, Your Honor, but I don't see where someone is serving their sentence as having an effect upon the punishment imposed. I disagree with the state that parole is not a substantial difference. I think that ignores reality.

QUESTION: So you say the difference between serving your sentence in prison and parole is a substantial difference, whereas the difference between serving part of your sentence in administrative segregation and the general prison population is not a substantial difference?

MR. FAIREY: I would much prefer to be in the

general population, but -- yes, there is a quantitative difference in those two things. One, you are, you have freedom. The other, you do not. One is like probation, the other you are still incarcerated.

QUESTION: Well, you have to report to your parole officer, you probably can't, you can't commit any crime, you can't do lots of things when you're on parole that a free citizen could.

MR. FAIREY: I agree, but you have freedom, much greater freedom than you would while incarcerated. I think this Court has recognized that in a number of instances. I think common sense tells us that.

The issue I think is whether or not there is a change in the quantum of punishment by changing this parole statute.

QUESTION: Mr. Fairey, you agree that there is no entitlement to the parole.

MR. FAIREY: I agree.

QUESTION: It is purely discretionary. You come up in 2 years and you could not sue if they don't give you the parole, right?

MR. FAIREY: I agree there is no right to release on parole.

QUESTION: Right. Okay. Now, suppose the parole statute is not changed to say you get a hearing

every 2 years, but what happens is the standards that the parole board has traditionally been applying, which are written down, are changed to be much more harsh, so that in point of fact whereas they would have paroled you on a 30-year sentence previously after 8 years, they now announce in the new rule that they will not parole you until 15 years.

MR. FAIREY: I think you are getting dangerously close to my dividing point. I think in many cases rather than writing down these changes you are talking about, Justice Scalia, they make that decision on their own and for a period of time based upon politics.

QUESTION: What is your answer if it's written down? It used to be if X, Y, and Z exist you are out in 8 years. Under the new ones no one gets out until 15 years for this particular crime.

MR. FAIREY: They I think you do get back into your analogy --

QUESTION: That's bad? That's bad?

MR. FAIREY: Not necessarily.

QUESTION: It's not bad?

MR. FAIREY: It depends upon --

QUESTION: Why is that any different from what you bring before us?

MR. FAIREY: Because what I bring before you is

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a situation where the state, not the discretionary agency, but the state has imposed regulations upon the discretionary agency. The parole board has always had the option of --

QUESTION: Oh, I see, so all that the state had to do would be to leave it up to the parole board how frequently they wanted their hearings --

MR. FAIREY: Oh, yes.

QUESTION: And if they used to have them every 1 year by regulation but they decide that in the future they're going to have them every 2 years, that's okay?

MR. FAIREY: Justice Scalia, if they had no rule and they left it completely to the discretion of the parole board, then there would be no right to complain because there would be no expectation and there would be no increase.

QUESTION: But the parole board has adopted a rule, and you say changing the parole board's own rule would not count for ex post facto purposes?

MR. FAIREY: If that rule has the force of law it would.

QUESTION: Well of course. Of course it has the force of law.

MR. FAIREY: Then I think it would.

QUESTION: It binds the parole board. The

parole board can change it, but as long as it's in effect the parole board is bound by it. And you can say that if they change their own rule from 1 year to 2 years that violates the Ex Post Facto Clause?

MR. FAIREY: In my opinion, yes, if that has the rule of law.

QUESTION: Wait, now answer my question. Now suppose they have a rule that says we will normally, we will grant parole if X, Y, and Z factors exist after 8 years, and they change that rule and say we're going to be tougher, we will not grant parole for anybody in this situation, even if X, Y, and Z exist, until 15 years. They have just changed their standard of discretion. Does that violate the Ex Post Facto Clause?

MR. FAIREY: Depending upon the -- I hate to be evasive to your question, and I'm not trying to be. It depends upon --

QUESTION: You're succeeding here.

MR. FAIREY: I appreciate that. It depends upon what the prisoner and the sentencing court know at the time of the sentencing. We need to go back to the purpose of ex post facto. It is a fairness doctrine. If the prisoner and the sentencing judge have an expectation of the effect of that sentence which includes --

QUESTION: But they do. You have conceded that

it doesn't matter whether it's the legislature that does it or the parole board that does it, right? You have conceded that. So long as it's a rule, you have conceded that.

MR. FAIREY: Respectfully, no, I don't think I have.

QUESTION: I thought you did. I thought you initially said that if you changed from 1 to 2 years by statute it was bad, but if the parole board did it it was good. And then I said suppose the parole board does it by regulation, and you said oh, well, if the regulation is binding then it would be bad. Right?

MR. FAIREY: Yes, sir. If the regulation has the force of law.

QUESTION: So it doesn't matter whether the state does it by legislation or by agency rule, so long as it has the force --

MR. FAIREY: Force of law.

QUESTION: Force of law, yes.

MR. FAIREY: Yes.

QUESTION: Okay. Now suppose the parole board discretionary guidelines have the force of law, they are bound by it, and they change those guidelines so as to make their discretion harsher.

MR. FAIREY: Discretionary guidelines, that's a

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dichotomy. Discretion and guidelines are two different things.

QUESTION: Call them regulations then. They say we will grant parole and they are bound by them.

MR. FAIREY: Then you are getting into a Parole Board v. Allen situation, and a Greenholtz situation if you have mandatory language in your guidelines. What I am saying is that our statute, any statute that sets up a minimal level for parole eligibility and consideration for release is considered by the sentencing judge and the prisoner in being sentenced. Changing that formula post-sentencing violates ex post facto because there's an expectation on both of those people's part, the judge, the sentencing judge and the prisoner, as to what that sentence will be.

There is an expectation as to when they will be eligible for release, which is what parole is. That is what is changed when you change legislatively or by rule if it has the effect of law.

QUESTION: Suppose that there is a written rule that you get your parole hearing once every year, but that also in the rule it is stated that the parole board may, because of its own work load and personnel problems, in its discretion change this to 2 years. And then it changes to 2 years. Is there an ex post facto violation?

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MR. FAIREY: Not if that was in the statute at the time of the sentencing, or, excuse me, at the time of the commission of the crime. In my view it all goes back to fairness. If someone is on notice of what the effect of their criminal conduct is and effect of what their sentence and punishment is, it's more than just -- punishment is not just a sentence. Punishment is how that sentence is effected upon this individual.

If a sentence like in this case is over 35 years, the earliest release is a little less than 10. The only method of that release is parole. When you start tinkering with that, then you are effecting reality of when people get out of prison. I mean, we could come up with all kinds of different dichotomies of what could happen and what could be changed, but I think it all goes back to the expectation of both the prisoner and the sentencing judge, which is the purpose of ex post facto, and it goes back to the original Calder categories that this enhances punishment. And it is done by the state, it is a penal statute, it is retrospective, therefore it violates ex post facto.

QUESTION: If it enhances punishment then why don't you lose on your threshold argument, that is that this is the improper form in which to cast this action, that it has to be habeas because you are talking about

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increased punishment, not a mere procedural matter, and therefore you should bring it under habeas?

MR. FAIREY: Because, Justice Ginsburg, while we wish release, we cannot insist upon it. We cannot seek it. We can simply seek the avenue of obtaining release. Under Preiser and its succeeding cases, Wolff and Allen and a whole series of cases, Greenholtz is among them, particularly I think Gerstein v. Pugh, this Court has entertained 1983 actions particularly in this area by prisoners that are not seeking release but are seeking what I think the Third Circuit called the process as opposed to the outcomes. Here we are seeking the process. We seek the hearing, which obviously we cannot obtain release without. But we seek simply the hearing.

As the Fourth Circuit said, the parole board need never release Mr. Roller. It simply need consider the issue every year. So under Preiser and under its succeeding cases, if you're not seeking the actual release or reduction in time, which we cannot --

QUESTION: You are seeking the opportunity to be released.

MR. FAIREY: Yes, ma'am. The opportunity to have the hearing which is the only matter on which we could obtain release.

QUESTION: But you have no expectation, no legal

expectation with regard to the outcome of that hearing.

MR. FAIREY: Yes. We have not. I agree. Because it is a discretionary determination -- just as I take a client in front of a sentencing judge he has no expectation of a particular sentence other than in the guidelines, in other words from probation to 10 years, but he has that expectation. If prior to me taking him in front of the judge that law were to change and say okay, now it's no longer zero to 10, now it's 9 to 10 --

QUESTION: But the guidelines are mandatory and appealable. That's not at all like parole.

MR. FAIREY: I'm sorry --

QUESTION: You have no cause of action if parole is denied even though you are the most desirable, eligible candidate for parole in the world. Right? Can you bring it to court and say --

MR. FAIREY: No.

QUESTION: -- you know, if anybody deserved parole, I did? You come to court and the court says get out of here. So what is your expectation? Zero.

MR. FAIREY: I misspoke.

QUESTION: So how have your expectations been changed by changing your hearing from 1 year to 2 year? You had no expectation to start off with, now you have that expectation, that non-expectation less frequently. I

don't see how that puts you in a worse position.

MR. FAIREY: You have an expectation of consideration. Now when I say guidelines I do not mean parole guidelines under the Federal system, I mean the sentencing, the ranges of the sentence. Most states, our state among them, do not use parole guidelines. We are simply talking here about a traditional common law parole situation that I grew up practicing law under. And every criminal defendant's first question is when am I getting out.

QUESTION: I know, and we talk as though there is some legal expectation there, but there is none or else you'd be able to bring a lawsuit to get out if you were a good parole candidate, and you can't. That means to me that this is a matter of clemency, that it has always been treated as clemency. And if that's the case, then I don't see how you have any complaint under the ex post facto laws.

MR. FAIREY: If you have no complaint under the ex post facto law, then you have no complaint with the state doing away with parole after someone is sentenced, which to me seems if it's not in violation of ex post facto, I don't know what the framers meant when they passed ex post facto. And I think it would contravene all of the cases that this Court has considered under ex post

facto consideration, the realistic view or expectation of the prisoner.

QUESTION: Now, you have to speak of legal expectation. I mean, yes, he might get a break and he hoped he would get a break. That's just like saying I expected to have a lenient judge when I was put on trial and they switched the judge on me just before the case began and I have, you know, Maximum John for my sentencing judge. In a way you can say your expectation was upset, but it's not a legal expectation. And the law's answer to that is that's too bad. You did the crime, you got 30 years.

MR. FAIREY: You did the crime and you got 30 years with a right under our law to parole consideration at the end of 10, because it says, our law says you shall be reviewed for parole. Not that you may. You may be released, you shall be reviewed, which in my understanding of the Hewitt v. Helms line of cases creates a liberty interest in the hearing at least.

QUESTION: I don't see how a right that does not exist can be turned into a right by saying that you'll get a hearing on it every 2 years.

MR. FAIREY: I don't agree that it's not a right that doesn't exist. I think there are different types of rights under our Constitution. Ex post facto is not due

process. Ex post facto is a right in and of itself. It is not in the Bill of Rights. It is in the Constitution, in its body. It has an ancient, historical point.

The parole system is ancient, as is ex post facto. It has its origins in our common laws of our states, as in South Carolina. It has traditionally been a manner in which people have obtained their release from custody. I don't think we can put that aside and say that because it doesn't fall neatly into some due process category that it is not a right and expectation that prisoners have.

Again I go back to it is similar in my view to the discretion a judge has in sentencing, and you can't, under Lindsey you can't change that after the fact.

QUESTION: The people you say could not put in a new, people cannot get fed up with parole and put in a new legislature that abolishes parole and say no more parole?

MR. FAIREY: Certainly they could --

QUESTION: They can't do that. They can't apply that to people --

MR. FAIREY: -- for the people sentenced from that point forward.

QUESTION: But not for people who are in jail already, right?

MR. FAIREY: No, because they were sentenced

under a system that had that as a release mechanism.

QUESTION: Although the people can get fed up with a governor who, I suppose, who commutes all death sentences --

MR. FAIREY: And vote him out.

QUESTION: -- and vote him out and put in a new governor.

MR. FAIREY: Yes.

QUESTION: But they can't do the same -- and that wouldn't violate the ex post facto laws because even though you committed your murder before the new governor got in. So the trick is whether it's a new governor or new legislature?

MR. FAIREY: In my view the trick is to be consistent with the Constitution. The Constitution forbids one and not the other. The Constitution encourages getting rid of the governor. The Constitution forbids changing the sentence after it is imposed. That is my view of --

QUESTION: But, you see, the governor is saying I know that I don't have to commute death sentences, it's discretionary, but I am choosing to do it. I am elected by the people and I am choosing to do it. When you put in a new governor that changes the policy, that doesn't violate the ex post facto laws.

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MR. FAIREY: No, it does not.

QUESTION: But you have a legislature who says we have this parole, we don't have to give it to you but we'll give it to you, and it's discretionary, you have no right to sue for it. You get in a new legislature who says we're not going to do that, and why is that any different from clemency by the governor and clemency by the legislature? I don't understand.

MR. FAIREY: Because one is the failure to exercise discretion, the other is removal of the discretion entirely, and there is a difference in those two things. That a governor has that discretion and doesn't exercise it is not the same -- it's just like a parole board having the discretion to release and deciding not to. But when you take away the right to consider the release it is a different animal, because then you end discretion.

There is no argument that the parole board need never parole any individual person, but when the state takes away its opportunity to do that then it violates ex post facto. Parole is simply a part of punishment. It has been. It may change at some point, but it will have to change prospectively rather than retroactively is our view.

QUESTION: May I just be sure of one thing? You

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probably said it at the beginning but I want to be sure. Do you agree that this case will be moot on January 1 if it isn't decided by then?

MR. FAIREY: Justice Stevens, I do.

QUESTION: I thought you did.

MR. FAIREY: But I wish for this Court to fashion a different remedy than the normal remedy.

QUESTION: And your best authority for saying that the Munsingwear vacation should not follow in this case is what?

MR. FAIREY: Is Munsingwear.

QUESTION: Munsingwear itself.

MR. FAIREY: It says, I believe, for the rule, they talk about why they have the rule. But it said that those who have prevented from obtaining the review to which they are entitled should not be treated as if there has been a review. In other words if you're not involved in ending the matter and it becomes moot, then you have been denied the right to litigate it and have it finally determined. Here the state caused it to end. They should not be relieved of the res judicata principles and the finality of this judgment.

Thank you.

QUESTION: Thank you, Mr. Fairey.

Mr. Lundberg, you have 5 minutes remaining.

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REBUTTAL ARGUMENT OF CARL N. LUNDBERG

ON BEHALF OF THE PETITIONERS

MR. LUNDBERG: Thank you. I'd like to make two points. It was said that parole is not a change in the sentence and that parole is not a punishment. I think he said that parole resulted in a change of sentence by being released and that it was, in effect changed the punishment. In South Carolina there is no right to be released on parole.

It derives originally from the constitution which gave the power to the governor to grant clemency and to commute sentences, and that ultimately resolved into a change in the constitution which then gave the power as a form of clemency to the parole board. These changes -- but it was always an absolutely discretionary decision and is still an absolutely discretionary decision. These changes which we're talking about that have come in by the general assembly do not in anyway change the discretionary powers involved in making this type of a decision. They --

QUESTION: It changes one thing. It requires them to hold hearings at certain intervals that they wouldn't otherwise have had to hold.

MR. LUNDBERG: Yes, insofar as that they --

QUESTION: There is a right to a hearing on

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whether you get out on parole or not.

MR. LUNDBERG: To be considered, that is absolutely correct. But it didn't change in anyway the, how the decision has to be approached or the result.

QUESTION: It's like you've got a right to file a lawsuit you aren't necessarily going to win, but you have a right to file it.

MR. LUNDBERG: Right. And that's how this case got brought before you, that's correct. That's the point that I would like to make.

QUESTION: Your position on the Munsingwear vacation is that it ought to be vacated even though the state was the party that changed it?

MR. LUNDBERG: Yes. Our position on that is that the Munsingwear requires there to be a vacation if the case becomes moot before this decision is rendered and that there's no other reason why the case wouldn't otherwise avoid mootness and get a decision. The fact that the state was involved in this particular issue doesn't resolve the fact that if the decision in Roller stands it has great impact on all procedural changes to the paroling process. So if this Court doesn't vacate the Roller decision in the Fourth Circuit it will have a bad precedent in terms of all procedural paroling issues.

QUESTION: Why is that? Why doesn't the state

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supreme court's decision continue that effect? I don't understand.

MR. LUNDBERG: Well, the state supreme court decision was predicated exclusively on a Federal basis, and it's our position that if this Court resolves that issue that --

QUESTION: Are you saying that the South Carolina Supreme Court goes in lock step with the Fourth Circuit on questions of Federal constitutional law?

MR. LUNDBERG: I don't know how they do in all cases. In this case that was the only thing that they cited to justify their retrenchment from the Gunter decision, where at that time they said that it was a procedural matter and that it was outside the purview of the Ex Post Facto Clause. Along comes the Roller case and says oh, no, it's inside the Ex Post Facto Clause, and the South Carolina Supreme Court apparently, from the way that the position, the case was argued, I mean written in the opinions, say we have to follow the Fourth Circuit's position. And they do.

But I don't think that there's any independent state ground set forth in the Griffin case to show why they otherwise did. All they have done is they have referred consistently to the Roller position.

QUESTION: Well, it's not a matter of being an

independent state ground, but it's a matter of being independent reasoning by the judges of the state court, and they came to that conclusion as to what the Federal law means, which they are entitled to.

MR. LUNDBERG: Which they are entitled to, but it's your prerogative to tell, to actually decide what the Federal law does mean and whether or not that decision was correct.

QUESTION: But if we simply decide the case is moot and are trying to decide on one procedural disposition of the case or another, certainly we will not have decided the merits in such a way as to overturn the decision of the Fourth Circuit on the merits.

MR. LUNDBERG: No, but if it's vacated then the decision of the South Carolina Supreme Court will no longer have any position from the Fourth Circuit to rely upon, and if they're going to continue along that same type of an analysis they'll have to independently reach it.

If there are no other questions. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lundberg.

The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Michael J. Cavanaugh, Executive Director, South Carolina Department of Probation, Parole and Pardon Services, Petitioners v. Gary Lee Roller
Case No. 92-1510

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BY Ann Mari Federico

(REPORTER)