

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CALIFORNIA DEPARTMENT OF CORRECTIONS, ET
AL., Petitioners v. JOSE RAMON MORALES

CASE NO: No. 93-1462

PLACE: Washington, D.C.

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CALIFORNIA DEPARTMENT OF :

4 CORRECTIONS, ET AL., :

5 Petitioners :

6 v. : No. 93-1462

7 JOSE RAMON MORALES :

8 - - - - -X

9 Washington, D.C.

10 Monday, January 9, 1995

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 1:00 p.m.

14 APPEARANCES:

15 JAMES CHING, ESQ., Supervising Deputy Attorney General of
16 California, Sacramento, California; on behalf of the
17 Petitioners.

18 JAMES R. ASPERGER, ESQ., Los Angeles, California; on
19 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 93-1462, the California Department of
5 Corrections v. Jose Ramon Morales.

6 Mr. Ching.

7 ORAL ARGUMENT OF JAMES CHING

8 ON BEHALF OF THE PETITIONERS

9 MR. CHING: Mr. Chief Justice and may it please
10 the Court:

11 There are two modes of analysis which are used
12 in determining ex post facto cases. The first is the
13 substantial harm or detriment analysis, and second is the
14 Calder/Collins analysis. Under either analysis, the
15 judgment of the Ninth Circuit in this case should be
16 reversed.

17 The history of substantial harm, detriment,
18 however the test is phrased, is relatively recent. We can
19 see, for instance, in Miller v. Florida, a case in which
20 there is a 9-0 vote, that an increase in the recommended
21 sentencing guides, which results in a recommended sentence
22 which is patently higher than that which the inmate
23 previously faced, would be an ex post facto law.

24 We are also aware, because of the concurring
25 opinion in Collins, of what does not constitute

1 substantial harm. That is, a procedural rule which does
2 not affect a concededly valid conviction.

3 Between these two poles is a lot of room, and in
4 this room I believe the indication, for instance, in the
5 concurring opinion of Chief Justice Rehnquist in Weaver,
6 that we are talking about a loose form of evaluation, an
7 evaluation of whether, on the bottom line, the inmate has
8 been harmed.

9 In the instant case, the Ninth Circuit made a
10 quick showing of substantial harm by assuming that it
11 existed. We have a statement that logic dictates that
12 because a parole suitability hearing must be had before a
13 parole date may be obtained, it must be that the failure
14 to accord them frequently amounted to substantial harm.

15 This is clearly fallacious. What the Ninth
16 Circuit has done --

17 QUESTION: Well, it may or may not be correct in
18 the given case, but doesn't it have something to recommend
19 it at least as a way of measuring what probably will be
20 the general effect of the statute?

21 MR. CHING: Well, certainly and, of course,
22 you're correct in pointing out that we are concerned with
23 the general class of prisoners affected.

24 QUESTION: And I take it you also would not say
25 that there is anything conclusive in the fact that there

1 will always be a finding that it would be unlikely that if
2 the prisoner came back within 3 years there would be any
3 relief. I take it you don't rest entirely on that to take
4 you out of the general rule.

5 MR. CHING: Yes, Your Honor, my contention is
6 that the provision of the annual parole suitability
7 hearing is a necessary condition, but it is not a
8 sufficient condition for any given inmate to obtain a
9 parole date.

10 QUESTION: Well, but is it always going to be --
11 in your view, is the general rule always going to be
12 displaced by the finding made that in all -- I forget what
13 the term of art is, that probably if the prisoner were to
14 come back within 3 years, he would not get relief by
15 parole?

16 MR. CHING: Yes, Your Honor, I agree entirely
17 with your supposition. That is, I am saying that the
18 findings made by the parole board that the individual
19 would not receive a parole date in the first and second
20 year subsequent to the initial hearing obviates any
21 possibility that he may successfully claim substantial
22 harm by the --

23 QUESTION: So it is conclusive, then.

24 MR. CHING: I'm sorry, yes, I meant -- I meant
25 to say that, yes.

1 QUESTION: Well, then what we're left with is a
2 general rule in which you concede the probable effect of
3 the general rule over a large class of cases will be to
4 extend the date before which parole is granted, and yet
5 you're saying that in any individual case there will never
6 be a showing of harm because of this particular finding.

7 MR. CHING: Yes.

8 QUESTION: Is that where we leave it?

9 MR. CHING: Yes. I believe that it is
10 impossible for an inmate who is affected by this
11 modification to show that he would have received
12 suitability -- a successful suitability hearing in the
13 first and second years, those years in which he would not
14 under the amendment statute, and therefore he can never
15 show substantial harm, and neither can any member of the
16 affected class, within reason.

17 QUESTION: Well, what about in Miller? Would it
18 have been possible to show that the recommended sentence
19 would necessarily be the sentence? There, also, you could
20 say that getting a lower recommended -- or getting a lower
21 recommended sentence is a necessary condition of
22 establishing your claim, but not a sufficient condition.

23 MR. CHING: Well, Marrero really is a case that
24 turns on a closer analysis of State statutes, and the
25 interrelation with the Federal system at that time between

1 the sentence pronounced, in actual terms of numbers of
2 years of incarceration, and the giving of parole, the
3 granting of parole.

4 In Marrero, there was no diminution to the
5 inmate involved. He remained parole ineligible until one-
6 third of the term had been served. I --

7 QUESTION: Suppose there had been a change in
8 that respect? Suppose that when the person is sentenced
9 he would come up for parole after one-third of the time of
10 the full sentence, and that is changed retroactively to
11 have him come up after he served one-half of the sentence.
12 Would that fall under the ex post facto ban?

13 MR. CHING: Yes, Your Honor.

14 QUESTION: And would you distinguish the parole
15 eligibility, the initial eligibility hearing from the
16 subsequent suitability hearing in that regard? Why do you
17 draw that -- you've given me a firm yes, if they change
18 the initial eligibility date to his detriment, that's ex
19 post facto, but if they change the later, the subsequent
20 reconsideration, which you call the suitability,
21 subsequent suitability hearings, that doesn't fall within
22 the ex post facto ban, so could you distinguish --

23 MR. CHING: Yes. Your Honor, the opportunity
24 for receiving parole in Marrero was keyed directly to the
25 sentence pronounced in that case.

1 If you go to the hearing itself, however, and
2 you establish, according to established criteria with
3 written findings, that the individual had no possibility
4 of being paroled in the second or third year afterwards,
5 then there is actual proof of no substantial harm, as
6 opposed to the possibility that you may find some harm to
7 him if his initial hearing is postponed, okay.

8 There is nothing that precedes the initial
9 hearing which would indicate that he would not be
10 successful at that first hearing, and besides, it is a
11 condition which provides for some amelioration of his
12 term.

13 What I am saying is that the production of
14 written findings as to his status is sufficient proof
15 positive that although -- that is, although he might have
16 deserved an initial hearing, he certainly need not deserve
17 a hearing as frequently in the future.

18 QUESTION: So if they just changed it from 1-
19 year interval to 2-year intervals, without any requirement
20 that the parole board find it unlikely --

21 MR. CHING: Yes.

22 QUESTION: -- that that would also fall under
23 the ex post facto --

24 MR. CHING: I think we're getting very close to
25 a possible ex post facto condition there.

1 The issue is whether or not the record supports
2 a finding of harm. Now, this is not, admittedly, well-
3 defined, but you can utilize some speculation about the
4 class as a whole, where you have nothing to indicate that
5 the individual is completely without any prospects for
6 parole.

7 The basic problem is defining the nature of
8 substantial harm. If the record provides solid and
9 unequivocal data that there could not be any harm because
10 he would not have been paroled in the intervening years
11 between the first and third year, I think there cannot be
12 any reasonable possibility, without countervailing data in
13 the record, that there is any substantial harm --

14 QUESTION: And is the principal datum that you
15 rely upon the board's own determination that the hearing
16 was unnecessary?

17 MR. CHING: Yes, Your Honor. The agency is
18 entrusted by State law, and the standards are well-defined
19 and established in regulation and State law. We assume
20 that an administrative agency performs its duty absent --

21 QUESTION: Can the board, if it deems it
22 necessary because there's some dramatic change in
23 circumstances, rescind its determination and hold an
24 earlier hearing, notwithstanding the ruling that it made?

25 MR. CHING: Certainly, Your Honor, and in --

1 QUESTION: And is there some -- is there a
2 citation for that? Is that --

3 MR. CHING: Your Honor, not in this particular
4 provision. We have -- we have an assertion by counsel
5 that the determination of postponement is immutable. I do
6 not believe it's so, and there's nothing in the record
7 that shows that.

8 QUESTION: Well, but what authority can you cite
9 to show that counsel is in error in that regard?

10 MR. CHING: I --

11 QUESTION: I notice the California supreme
12 court, as I recall, said that it's conceivable a hearing
13 could be held, but --

14 MR. CHING: Yes, it is conceivable under --

15 QUESTION: -- that seems to me speculation on
16 the part of the -- California's highest court, and that is
17 not a very sound basis upon which --

18 MR. CHING: Well, I believe --

19 QUESTION: For us to base a decision.

20 MR. CHING: -- the meaning of conceivability
21 there is that there is no specific regulation which
22 authorizes the inmate to make a direct appeal to the board
23 for an earlier hearing notwithstanding the previous
24 findings. However, I believe that is the practice of the
25 board, therefore there is nothing in the record one way or

1 the other.

2 QUESTION: You mean it's the practice, even if
3 they've made this finding that there's no reasonable
4 possibility?

5 MR. CHING: Yes. I am informed --

6 QUESTION: Doesn't that indicate that the
7 finding should not be taken at face value?

8 MR. CHING: No. If the inmate should say,
9 within a year I have made such significant progress that
10 your prior finding about me is incorrect, the board will
11 review the file, it is my understanding, and consider
12 whether or not --

13 QUESTION: That suggests that you can't be sure
14 at the time the finding is made because your procedures
15 allow second-guessing the finding.

16 MR. CHING: Well, Your Honor, no. What it shows
17 is a great deal of solicitude toward the inmates by the
18 board, in that an inquiry --

19 QUESTION: Why would they show solicitude for an
20 inmate who there was no reasonable possibility of any
21 chance of parole for the next 2 years? I don't understand
22 that.

23 MR. CHING: Well, I believe it's --

24 QUESTION: If the finding isn't conclusive, why
25 take the trouble to make it?

1 MR. CHING: Oh, it's definitely conclusive
2 absent new information. If the inmate can produce new
3 information -- for instance --

4 QUESTION: Well, but there'll always be new
5 information in the ensuing year or two. He'll always
6 argue I behaved better than you expected, I passed my high
7 school exam, or something. There's always new information
8 every year, isn't there?

9 MR. CHING: Yes, and in fact the accumulation of
10 information would not be reviewed absent some direct
11 inquiry by the inmate, or until the preparation was made
12 for the postponed hearing.

13 QUESTION: Can the inmate challenge the board's
14 determination that it would be -- it would not be
15 reasonable to expect parole within 3 years?

16 MR. CHING: Yes, Your Honor. Habeas corpus is
17 available to the inmate, and -- both in State and Federal
18 courts, but also --

19 QUESTION: What is available? I didn't hear
20 the -- what kind of --

21 MR. CHING: Habeas corpus -- I'm sorry.

22 QUESTION: You bring a State habeas corpus in
23 order to get the accelerated hearing, or in order to get
24 the regularly scheduled hearing?

25 MR. CHING: In other words, the inmate would

1 apply to a State court for a habeas corpus because of the
2 postponement.

3 QUESTION: Well, what good does it do for the
4 California legislature to pass a statute, then, that says
5 instead of having hearings every year we're going to have
6 them every 3 years, if every inmate that is disadvantaged
7 by that can go and get a State habeas petition?

8 MR. CHING: Well --

9 QUESTION: Have there been cases, actual cases
10 in California where the California courts have reviewed
11 this sort of a determination by the parole board?

12 MR. CHING: I have not personally handled any.
13 I do not have a citation for a published case at this
14 point. However, I am certain that inmates have filed such
15 writs. The writs, of course --

16 QUESTION: Well, inmates file lots of writs --

17 MR. CHING: Yes, they --

18 QUESTION: -- that don't get anywhere.

19 MR. CHING: Yes.

20 QUESTION: You think the California courts, if
21 he made some sort of a showing that this was a disputed
22 determination and that he could come into habeas corpus
23 and say, look, they were wrong in saying I wouldn't be
24 eligible for parole because, you know, look at all the
25 good things in my background, and the habeas court would

1 pass on that one way or the other?

2 MR. CHING: I believe that the courts retain
3 jurisdiction to do so.

4 QUESTION: Well, that the -- my question was, do
5 you think they would decide a case like this on the
6 merits?

7 MR. CHING: I have not seen one, Your Honor. I
8 believe it's theoretically possible.

9 QUESTION: So it's speculative on your part
10 whether a habeas remedy is available, just as it's
11 speculative on your part in the California supreme
12 court's -- or that the board might alter its decision and
13 hold an earlier hearing? All this is speculation?

14 MR. CHING: Your Honor, I can only point out
15 that as to the writ of habeas corpus, it's clearly within
16 the jurisdiction of the superior court to do so, and as to
17 the agency practice, I only know that it is practice and
18 it is not placed in any regulation which I may cite to you
19 today.

20 QUESTION: Is there some date by which this
21 particular respondent has to be paroled, in any event?

22 MR. CHING: No, Your Honor.

23 QUESTION: It's life, unless --

24 MR. CHING: It is a true life maximum, Your
25 Honor. The matrix that we have pointed out is a matter of

1 estimating the possible times, should a date be set. That
2 is, should he be found suitable for parole. The matrix is
3 not in operation until that time.

4 QUESTION: Well, if this is a true life
5 sentence, when is the first parole -- how long after he
6 goes to prison is the first parole hearing at which he
7 might be released?

8 MR. CHING: His first parole hearing is the
9 minimum eligible parole date, which is the bottom of the
10 term pronounced -- that is 15 to life in this case --
11 minus such credits as he may have earned for good
12 behavior.

13 QUESTION: So it would be 15 years after he
14 enters prison, minus time for good behavior?

15 MR. CHING: Yes.

16 QUESTION: And that's when he had his -- he had
17 his parole eligibility hearing.

18 MR. CHING: Yes, Your Honor.

19 QUESTION: And at that time they said, don't
20 come back for another 3 years?

21 MR. CHING: Yes, they did, based on an
22 examination of his record.

23 QUESTION: Could the State have passed a statute
24 in this case saying that a hearing can be held whenever
25 the board thinks there's a probability that parole would

1 be granted?

2 MR. CHING: Yes, Your Honor, that would be
3 within the discretion that is commonly accorded to parole
4 boards throughout the Nation.

5 QUESTION: You think that would not present an
6 ex post facto problem, if previous --

7 MR. CHING: If it had been modified.

8 QUESTION: Yes. If the first rule were that you
9 have a parole hearing every 2 years, and then the
10 legislature modified it to say that you don't get the
11 hearing every 2 years, you just get it when the board
12 thinks that there's a likelihood that you'll be paroled.

13 MR. CHING: I would not think it would present
14 an ex post facto problem if the findings that we have in
15 this case were made.

16 The mere prospect of a hearing is not sufficient
17 to deprive -- to indicate a deprivation of any substantial
18 right that he may have.

19 QUESTION: But I thought you answered my
20 question earlier that if they cut the time back from
21 annual to 2-year intervals without requiring the parole
22 board to find anything at all about the particular
23 offender, that that would violate the ex post facto
24 clause.

25 MR. CHING: My contention there was that without

1 the findings you have no way of determining the
2 individual's actual suitability for parole, hence you have
3 only considerations which may derive from the situation
4 presented by the increase in time, and therefore some
5 speculation may enter into the calculation of harm to the
6 class involved.

7 QUESTION: Excuse me, I don't under -- the
8 burden, I thought your proposition was the burden is upon
9 the prisoner to show that harm accrued from the change.

10 MR. CHING: Well, Your Honor --

11 QUESTION: Is that so, or not?

12 MR. CHING: Yes.

13 QUESTION: Well, if that's so, then whether
14 there's a finding or not, it seems to me, you have to
15 argue there's no violation of the ex post facto clause,
16 because the prisoner can't show that he's been harmed.

17 MR. CHING: I have seen cases, Your Honor, which
18 very much tracked Justice Ginsburg's hypothetical in which
19 ex post facto implications were found.

20 My contention as to whether it's the
21 petitioners' burden is based on a consideration that we
22 have presented here with a habeas corpus in which he bears
23 the burden of proof, and my other contention is that the
24 record in every one of these cases --

25 QUESTION: Well, he always bears the burden of

1 proof of showing an ex post facto violation, I assume,
2 doesn't he?

3 MR. CHING: Yes, but specifically in the context
4 of habeas corpus. I had in mind the alternative which has
5 been permitted in Akins and Roller of an injunction
6 coupled with a 1983 action.

7 QUESTION: But I still don't see why you need
8 the finding. It's nice to have it, I suppose, but as far
9 as you're concerned, this case comes out the same way with
10 the finding or without it.

11 MR. CHING: Unless the court in its solicitude
12 determines that the initial parole hearing presents such
13 an advantageous situation for the class of prisoners
14 affected --

15 QUESTION: But before, your answer was not the
16 court's solicitude. You gave me an unequivocal yes that
17 if they cut the time, if they enlarged the time from one-
18 third of the sentence to half the sentence, that that
19 would violate the ex post facto clause, and then you
20 further said that if they decreased the -- they increased
21 the interval from 1 year to 2 years, that also would
22 violate the ex post facto clause.

23 I'm trying to understand precisely what your
24 argument is, because now you seem to be qualifying your
25 earlier answers.

1 MR. CHING: Your Honor, my -- my statement as to
2 the increase in the minimum time served prior to the
3 initial hearing --

4 QUESTION: Yes.

5 MR. CHING: Is based on my examination of the
6 case law. As to my position on the increase, if that
7 increase is accompanied by specific findings similar to
8 the ones in this case, is that it is not an ex post facto
9 violation.

10 QUESTION: And if there are no findings, the
11 legislature just says in every case we want to conserve
12 resources so we're going to make it hearings every 2
13 years, not every 1 year.

14 MR. CHING: Yes, I would believe that would be
15 close to an ex post facto violation for the same reason
16 that the increase in the minimum term would be. This
17 Court may speculate as to the harm --

18 QUESTION: Close to, but not?

19 MR. CHING: I hedge because I find the case law
20 quite equivocal.

21 QUESTION: I thought you were drawing a line
22 because of the reason you gave me in answer to one of my
23 earlier questions. If there is no finding, as in this
24 case, then the extension of the time before which another
25 hearing could be held I supposed would run afoul of what

1 you concede to be the generally expectable effect of a
2 change of the law like this.

3 You conceded that the -- that in general the
4 effect of such a change in the law will be to increase the
5 time which must be served before parole, so I thought you
6 were drawing the line as you did because in the absence of
7 a finding that this fellow had no reasonable expectation,
8 he could take advantage of the general rule that a change
9 in the law like this will tend to increase the sentence
10 served, and as a general rule will do so. Isn't that --

11 MR. CHING: Yes, that's --

12 QUESTION: -- why you draw the line where you
13 do?

14 MR. CHING: That's correct, Justice Souter.
15 That's what I meant to say.

16 I think that this discussion of substantial harm
17 must be qualified by a consideration of the Calder
18 categories which are emphasized again in the majority
19 opinion in Collins. The only logical category which may
20 be affected by this change before the Court is a possible
21 increase in punishment.

22 The numerous tests that have been utilized in
23 the ex post facto area, a mere regulation as opposed to a
24 change in the law, great discretion in the administrative
25 agency, the procedural substance distinction, all of them

1 talk about and around the issue of attenuation. What is
2 the linkage between the term of years pronounced as a
3 sentence and the prospect of parole?

4 If there is a linkage, then a change in the
5 parole procedure would be a change in the determinant of
6 the sentence, and therefore there would be a possible ex
7 post facto violation.

8 There are two extremes in parole systems, one in
9 which there is a strict determinism. The sentence
10 pronounced also determines the time of parole. The other
11 extreme is something very much like the California system.
12 Complete discretion is given to an administrative agency
13 subsequent to the pronouncement of a term of years. if
14 there is no substantial linkage, as in the California-
15 type system, then there cannot be a connection under the
16 third category of Calder, and therefore there cannot be an
17 ex post facto violation.

18 In sum, the two tests can coexist together in
19 the easy cases. They did so in Collins, they did so in
20 effect in Miller, and they did so in Weaver. I believe,
21 however, that there is substantial problem with compliance
22 with the majority opinion in Collins in the courts of
23 appeal of this country, and it's necessary for this Court
24 to remind the courts of appeal that we are now dealing
25 with Calder/Collins analysis, and this should be the

1 primary means of resolving ex post facto claims.

2 Unless there are further questions, I wish to
3 reserve the remainder of my time for rebuttal.

4 QUESTION: Very well, Mr. Ching.

5 Mr. Asperger, we'll hear from you.

6 ORAL ARGUMENT OF JAMES R. ASPERGER

7 ON BEHALF OF THE RESPONDENT

8 MR. ASPERGER: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 The core of the ex post facto in this case is
11 the retroactive denial of prisoners' opportunities for
12 parole. The State had no obligation here to set up a
13 parole system in the first instance, nor did it have any
14 obligation to design the system such that the only
15 mechanism for parole consideration and release was a
16 mandatory annual hearing, but when the State made the
17 affirmative decision to do so, as it did in this case, the
18 retroactive elimination of that hearing, of the only
19 mechanism under the State law for a prisoner's release,
20 violates, the ex post facto clause.

21 In effect here, by taking away that mechanism
22 for consideration for release, the State has in effect
23 made the prisoner ineligible for parole for a period of
24 time.

25 The State -- Mr. Ching uses the example that it

1 would be a violation if the initial eligibility date were
2 extended from one-third of the term of years to one-half.
3 There is no analytical distinction between that violation
4 of the ex post facto clause and this violation.

5 The Court asked the question about the finding
6 in this case. I believe the finding for purposes of the
7 ex post facto clause is somewhat of a red herring here.
8 The question is, could the legislature in the first
9 instance deny the opportunity for parole which was
10 previously guaranteed by the statute for a period of time?

11 If the answer to that question is no, then the
12 legislature can't get around that violation by delegating
13 discretion to an administrative agency to do so.

14 You might take another example. Take Lindsey
15 with a slight variation. Lindsey provided for a 15-year
16 mandatory minimum sentence, and the Court found that to be
17 a violation. Let's assume that's the statute in the first
18 instance, and then it's obvious, I think, that the
19 legislature could not say, we're going to retroactively
20 create a mandatory minimum sentence of 30 years, so it
21 would be no less of a violation for the legislature to say
22 to the judge, you can now, judge, impose a term of years
23 retroactively for up to 30 years, the point being that the
24 delegation of discretion to do what the legislature could
25 not do in the first instance is just as much of a

1 violation of the ex post facto clause as the legislature's
2 original action?

3 QUESTION: Well, why isn't the distinction
4 simply that something more than discretion has been
5 granted? It is discretion controlled by a probability
6 judgment that must be made, and if the probability
7 judgment is, in fact, sound, then one could conclude, as
8 Mr. Ching argues, that the prisoner has in fact not lost
9 any.

10 MR. ASPERGER: I think there are at least two
11 responses to that question, Your Honor. First of all is,
12 the changing of the standard to a probability
13 determination is very different from what the State had
14 set up in the first instance, and that was a guaranteed
15 annual consideration of all current facts to decide if,
16 over time, the prisoner had become suitable for release,
17 and many of the factors under the State --

18 QUESTION: Well, if I understand you, you're
19 saying that in fact the very definition of the sentence
20 includes these opportunities regardless of whether the
21 opportunities would be likely to result in release, that a
22 sentence is essentially different depending on whether
23 it's going to be reviewed every year or not, even in cases
24 in which the annual review can be assumed to have no
25 likely effect on the release date.

1 MR. ASPERGER: I'm saying you have to start with
2 a State statute in the first instance, and since the State
3 statute here requires current present consideration of the
4 facts, a fresh look, based upon a prisoner's
5 rehabilitation and capacity to be reintegrated into
6 society, that the legislature cannot change the rules of
7 the game after the offense has been committed, and that is
8 an essential component here.

9 You can also look at it on a broader level, I
10 think, Your Honor and that is, if you compare, for
11 example, a life sentence that carries with it the
12 possibility of parole and a life sentence that does not
13 have any possibility of parole, although there's no
14 guarantee that the prisoner will get out, there's no
15 doubt, based upon common sense and practical experience,
16 that the life sentence without the possibility of parole
17 is more onerous.

18 This Court recognized that principle in Solomon
19 v. Helms for the Eighth Amendment purposes. It also
20 recognized that principle in Warden v. Marrero, when it
21 held that the taking away of parole eligibility is
22 punishment, and a penalty.

23 QUESTION: But that's because there's a
24 probability of release is there not? That's the only --
25 that's the legal reason --

1 MR. ASPERGER: Yes, I --

2 QUESTION: -- the moving force behind the ex
3 post facto argument.

4 MR. ASPERGER: I don't read the cases that way,
5 Your Honor. I don't believe it's because there is a
6 probability of release. It's because there is an
7 opportunity of release. The key --

8 QUESTION: Mr. Asperger, suppose -- I mean, to
9 test that, suppose the procedures of the State had
10 required that each of these annual parole hearings last
11 for as long as the prisoner desired -- you could put on as
12 much evidence as long as it took -- and then they've
13 decided these things are taking too much time, so they are
14 now saying, parole release hearings henceforth will last
15 no more than 1 hour. You'll have an hour to make the
16 case. We'll think about it, decide it, and be done with
17 it. Is that an ex post facto law?

18 MR. ASPERGER: I think the substance of what the
19 State is giving the prisoner here, Your Honor, is a fresh
20 look at the facts each year, and the State may be free.
21 You're one step removed from the situation here. The --

22 QUESTION: Am I? I'm not sure. The only thing
23 that's happened is that the -- you can certainly make your
24 case better in 3 hours than in 1 hour, can't you?

25 MR. ASPERGER: I think there's some question

1 about that in some cases, Your Honor. Oftentimes you can
2 make your case very well in a brief period of time,
3 depending upon what the facts and the merits are, but I
4 think the substance here, the substance that was conferred
5 by the State in the first instance, comes from the
6 original statute that was enacted in 197 --

7 QUESTION: The substance in the case I've given
8 you is how long each hearing is. The substance in the
9 case that you're talking about before us here is how
10 frequently the hearings will be.

11 MR. ASPERGER: I think --

12 QUESTION: I'm not sure either of them goes to
13 whether or not you get parole, directly. It simply
14 doesn't. It goes to, you know, how good your chances are.
15 You acknowledge that, especially when the fact-finder has
16 to make a prediction. We'll give you a hearing next year
17 unless I can make this fact-finding. I don't see that
18 that's very much different from simply cutting back the
19 amount of time you have to plead.

20 MR. ASPERGER: Your Honor, I do see, depending
21 on the particular facts, that may or may not be the case,
22 but I do see a major distinction between taking away what
23 the statute gave as a fresh look at the facts.

24 If you look at the California parole scheme, the
25 fact -- many of the factors that are looked at are

1 institutional behavior, development of marketable skills,
2 showings of remorse, and a host of other considerations
3 that change over time, and so when you take away the
4 hearing in its entirety, you're taking away the guts or
5 the substance of what the statute conferred at the time of
6 the offense.

7 QUESTION: It won't change over time for
8 everybody. I mean, if this fellow is a multiple ax
9 murderer, they're not going to let him out any sooner
10 because he's acquired a useful trade in the meantime. I
11 mean, isn't it clear that in some cases these factors
12 predictably are not going to make any difference, and
13 shouldn't the State be able to say, it's no use going
14 through a hearing next year, this multiple ax murderer is
15 not going to get out for the next 2 years?

16 MR. ASPERGER: Your Honor, I think for purposes
17 of the ex post facto clause the answer to that question is
18 no. You could just as easily have a defendant like you
19 have in Rummell v. Estelle, who was subjected to a career
20 criminal statute and had only taken \$150, or whatever the
21 amount was involved in that case, and your judgment, your
22 standard that you apply here has to be the same.

23 QUESTION: Well, supposing -- you say,
24 Mr. Asperger, one of the factors to be considered is
25 showing of remorse. Now, if the prisoner hasn't shown any

1 remorse in the first 15 years he's been in prison, do you
2 think the parole board has to anticipate that perhaps in
3 the sixteenth or seventeenth year he may show some
4 remorse?

5 MR. ASPERGER: Your Honor, I don't think the
6 Court should be getting involved in making that type of
7 prediction, or getting into that level of analysis.

8 QUESTION: You may be right, but I don't think
9 that that necessarily helps your cause.

10 MR. ASPERGER: Let me try and explain how I
11 think it does, Your Honor. I think that for ex post facto
12 purposes the question that the Court should be asking is,
13 first of all, has the prisoner shown that he or she was
14 subjected to the statute that imposes the punishment?
15 Once the answer to that question is yes, as it clearly is
16 here, you have to move to a higher level of analysis. You
17 have to look at the statute itself, and a very good
18 example of that is the case of *Dobbert v. Florida*.

19 In that case, the defendant received the most
20 onerous sentence possible under our system of
21 jurisprudence -- death -- and yet this Court held that
22 we've got to go beyond the individual defendant. We have
23 to look at the State statute, and the State statute in
24 this case is on the whole ameliorative and satisfies the
25 ex post facto clause.

1 In this case, in Morales' case, the statute has
2 no ameliorative qualities whatsoever.

3 QUESTION: Well, Mr. Asperger, we have said in
4 several cases that procedural changes don't violate the ex
5 post facto clause, and the substantive standards for
6 granting parole in California have not changed with this
7 law. What has changed is the date in which a suitability
8 hearing will be conducted if certain findings are made.
9 Why aren't those procedural changes?

10 MR. ASPERGER: Your Honor, first of all I think
11 that, as I read the Court's opinion in Collins v.
12 Youngblood, the analysis doesn't hinge so much as on
13 procedure versus substance. You look at whether the
14 penalty is in any way more onerous.

15 And I think in this case, when you look at the
16 statute as it was originally adopted, which doesn't say
17 the parole board has discretion to hold hearings whenever
18 it would like, it says it must hold hearings to give
19 defendants a fresh look, that is something substantive,
20 and the problem you're going to run into if you find
21 that -- based on the facts of Morales' case that there
22 isn't a violation, is there's really no logical stopping
23 point.

24 California has already changed the statute to
25 permit delays for all murderers up to 5 years. That's

1 effective the first of this year. I don't see any
2 analytical distinction between 5 years, 10 years, or the
3 elimination of the opportunity for parole in its entirety.

4 It seems to me the theoretical question you are
5 dealing with in this case is, does it violate the
6 Constitution to retroactively deny opportunities for
7 parole?

8 If a State can't eliminate the statute in its
9 entirety retroactively, then it can't do it in a slightly
10 less onerous way by eliminating part of that eligibility
11 for parole, and that comes back to the question that was
12 asked earlier. If you extend the eligibility for parole
13 from one-third of the term to one-half of the term, that's
14 a violation. There's no logical, theoretical, or
15 analytical difference.

16 QUESTION: So you say there are no lines, then,
17 that can be drawn, and so essentially it's irrelevant that
18 in this case we're dealing with a particular class that's
19 unlikely to be paroled early? This is a double -- this is
20 just for a double murder situation, isn't it? This --

21 MR. ASPERGER: He had -- yes. He had committed
22 two murders at different times --

23 QUESTION: Yes.

24 MR. ASPERGER: -- and he was in jail the second
25 time.

1 QUESTION: So the slimness of the chance that
2 that category of offenders would get out is essentially
3 irrelevant, or is irrelevant to the ex post facto
4 question.

5 MR. ASPERGER: Given the way the State has
6 structured the law in the first instance, which has to be
7 the starting point, the answer to that question is yes,
8 Your Honor. You can't look at individual probabilities.
9 Looking at individual --

10 QUESTION: I'm not talking about an individual
11 offender. I'm talking about, can California say, for that
12 category of offenders we know that the chance of parole is
13 so slight that there isn't going to be any detriment if we
14 prolong the interval?

15 MR. ASPERGER: I believe the answer to that
16 question is yes, Your Honor, for two reasons. One is, I
17 don't see any intellectual distinction between that case
18 and the factual situation of Rummell v. Estelle, where you
19 have someone who in fact, as the Court noted in Solomon v.
20 Helms, got out on parole. If the parole statute had been
21 changed to extend his eligibility for parole or deny him
22 the hearing for 5 years, that would clearly have been an
23 egregious violation in his case because of the time that
24 he got out.

25 So when you're conducting your theoretical -- or

1 your analysis here as a matter of principle, I think you
2 should put out of your minds the fact that we're talking
3 about a category of murderers, because I don't see that as
4 distinguishable for ex post facto purposes.

5 I also think that when you get into analysis of
6 individual harm, as the State is asking you to do in this
7 case, you really open the floodgates to enormous
8 jurisprudential problems, and making those types of
9 considerations, whether it's individual or class, is going
10 to be something that is very difficult for the Court to
11 do.

12 And it also, even with this class of
13 individuals, over time, the fact of the matter is that
14 many life prisoners in California do get out. Now, maybe
15 not at age 54, like Mr. Morales is, but over time they
16 will, so that's another reason why the -- trying to
17 permit, or permitting the State to simply deny or delay
18 the hearing for a class of individuals as we have in this
19 case has no principal or logical stopping point.

20 QUESTION: Why doesn't it -- the first time they
21 have this parole eligibility hearing, how long has he been
22 in prison, the first year, the second year, or when does
23 he --

24 MR. ASPERGER: No, the way it's set up under
25 California law for life prisoners is that the statute,

1 under Penal Code section 2131, the State initially
2 provides for eligibility of 15 years, but you can earn
3 good-time credit, and --

4 QUESTION: Let's take his first hearing.

5 MR. ASPERGER: It's 10 years.

6 QUESTION: Fine. So, 10 or 15 years. Anyway,
7 he goes to the first hearing. Suppose they say, fine,
8 we're going to grant it. Does he get out the next day?
9 When does he get out?

10 MR. ASPERGER: They have to set a release date
11 immediately.

12 QUESTION: They could set one the next day?

13 MR. ASPERGER: They could set one the next day,
14 they could set one in the future, and you'll notice in the
15 brief there's a reference to the matrix which would say,
16 in this case it's 19 years. In fact, though, there's pre-
17 prison credit that comes out of that base term of
18 confinement, and there's also good-time credit there, so
19 it is possible, depending on what the parole board does
20 with the 1,050 days' mandatory credit and good-time
21 credit, he could be -- he could have been released in
22 1994.

23 QUESTION: All right, so the practical -- there
24 is a practical difference, then. If you're going to --
25 you say you're going to hold them every 2 years instead of

1 1 year, then what the practical difference is, the parole
2 board couldn't let him out during that year.

3 MR. ASPERGER: Correct.

4 QUESTION: That's the difference.

5 MR. ASPERGER: That's correct, because this is
6 the only way he can get out.

7 QUESTION: On the other hand, they're only doing
8 that for people who they determine the chances of letting
9 them out during the next year are near zero, or small.

10 MR. ASPERGER: Well, there's a --

11 QUESTION: That's what the statute says.

12 MR. ASPERGER: The statute doesn't say there's
13 no way somebody gets --

14 QUESTION: No, not no way, it says reasonable.

15 MR. ASPERGER: It says reasonable.

16 QUESTION: Okay. Now, why do you say there's no
17 difference between a statute like that and, let's say, one
18 that didn't say it's limited to people who we wouldn't let
19 out anyway, or reasonably expect to? Why isn't this thing
20 turned on what's practical?

21 That is, suppose a commission just said, or a
22 State just said, we hold hearings once every year, and
23 they were always held on Mondays, and they said, we're
24 going to hold them on Tuesdays, or they said we're not
25 going to hold them during Christmas vacation, or we're not

1 going to hold them -- I mean, why isn't it all practical
2 rather than theoretical, because after all, one day
3 theoretically could theoretically make a difference?

4 MR. ASPERGER: The difference between Monday and
5 Tuesday is not a matter of substance, in my view. I think
6 what we're dealing with here is something that is of great
7 substance and great importance.

8 QUESTION: All right. But that was my question,
9 then. You are seeing it in practical terms and not as a
10 matter of theory. That is, the question before us would
11 be whether, as a practical matter, there's a significant
12 number of people who might serve significantly greater
13 time as a result of the change. Is that right?

14 MR. ASPERGER: No. I do not agree with that,
15 Your Honor. I think that you -- there is the potential for
16 one or more or -- prisoners to serve more than they would
17 serve under what was granted them and conferred under the
18 original statute. That is a very serious problem.

19 Take that hypothetical one step further. What
20 if the legislature said, we're going to allow the judge in
21 the first instance to make a determination that
22 Mr. Morales should never be eligible for parole. That
23 would be okay if it was prospective, but it's not okay in
24 this case because it's retroactive, and it clearly, much
25 more clearly than a 1-year or 2-year delay, affects his

1 eligibility for parole.

2 But I think the key question that you have to
3 look at is, does the statute affect the eligibility for
4 parole and in fact deny him eligibility for parole for
5 longer than it originally granted that eligibility, and
6 then once you answer that question, there is a violation
7 or there isn't, there's no distinction that I think is
8 meaningful between 2 years, 3 years, 5 years, and 50
9 years.

10 QUESTION: But there is for a day. There is for
11 a week.

12 MR. ASPERGER: Well, you -- what is -- that's
13 not what the statute granted, Your Honor. The statute
14 granted a hearing once a year, and so my assumption is
15 that the substance of what he is being given here is a
16 hearing once a year, so given that assumption, whether the
17 hearing is on Monday or Tuesday is not a violation.

18 QUESTION: Well, do you say -- if he was granted
19 a hearing once a year, supposing his last hearing was on
20 January 15th, 1994, and that the parole board must grant
21 him a hearing by January 15th, 1995, what if they said,
22 we're just not meeting in January, we're meeting in
23 February, and we'll hear him then, so instead of getting a
24 hearing once a year, he's gotten a hearing once every 13
25 months?

1 MR. ASPERGER: Then, based upon the text of the
2 statute and what is granted in the first instance, there
3 is a violation, because the guarantee was once a year.

4 In that analysis, the practical effect would be
5 you'd probably find it's a harmless error if they
6 conferred the hearing in February.

7 QUESTION: But is that -- do we ordinarily
8 decide ex post facto claims on the basis of harmless
9 error?

10 MR. ASPERGER: No, not in the first instance.
11 You would find a violation, but if he got the hearing,
12 then you'd have to do an individual analysis at the time
13 it reached the courts about whether he was harmed about
14 it, but he does have to have that hearing every year and
15 that arises from the language or the substance of the
16 guarantee under the statute.

17 QUESTION: You're saying he's harmed even if
18 it's only 1 day, and even if it's Tuesday to Wednesday,
19 but I guess you're appealing to the doctrine de minimis
20 non curat lex, right? One -- it's de minimis. It doesn't
21 matter.

22 MR. ASPERGER: Well --

23 QUESTION: Wouldn't you say that?

24 MR. ASPERGER: -- I don't think there is --

25 QUESTION: You're going to give away the case

1 where the hearing is held on a Wednesday instead of a
2 Tuesday, aren't you? Why, because it's minimal. De
3 minimis, right?

4 MR. ASPERGER: For -- if it's more onerous in
5 the first instance when you're looking at the statutory
6 level --

7 QUESTION: It's technically a violation.

8 MR. ASPERGER: -- then it is a violation of the
9 ex post facto clause.

10 QUESTION: That's what de minimis is for, to
11 take care of technical violations that don't really make
12 any significant difference.

13 MR. ASPERGER: You Honor, I think the --

14 QUESTION: I'm trying to help you here.

15 (Laughter.)

16 MR. ASPERGER: And my point is, yes, if it's
17 more than a day you do have a violation, but it may turn
18 out that he isn't harmed. You still have the violation in
19 the first instance.

20 QUESTION: Do you agree with counsel for the
21 State that as a matter of regular administrative practice
22 the parole board could reopen its determination not to
23 give a hearing?

24 MR. ASPERGER: Absolutely not, Your Honor. I
25 don't -- I haven't seen anything in the record to suggest

1 that that can occur or has ever occurred. More
2 importantly, neither the statute nor the regulation
3 provides any mechanism whatsoever for the prisoner to
4 have -- to send a letter for the parole board to consider
5 that letter for having a reconsideration of the hearing.

6 I think the focus for ex post facto purposes has
7 to be what the statutes and the law provide, not what the
8 board may do in exercising discretion outside the law.

9 In addition, I think given the California
10 statute as it was in effect when Morales committed his
11 offense, the substance of that statute was a hearing, a
12 full-blown hearing on the merits, a fresh look at the
13 facts, and sending a letter is vastly different from
14 having that hearing that was guaranteed in the first
15 instance.

16 Now, I think that in looking at this case,
17 another thing that is important to consider is that if the
18 Court is to find there's no ex post factor violation in
19 this case, it in effect undermines, and the way that I
20 would interpret that decision overrules Lindsey, Weaver,
21 and Miller.

22 The focus in each of those cases was on the
23 opportunities for the prisoner to receive a sentence that
24 was less onerous, or less burdensome. In each case, the
25 State made exactly the argument that the State of

1 California is making here.

2 The individual offender cannot show that in his
3 particular case he would have received a less onerous
4 sentence, so I don't think the standard can change for
5 purposes of Mr. Morales. To adopt the position that the
6 State is asking for significantly undercuts and
7 ultimately, I think, leads to the demise of that principle
8 set forth in each of those cases.

9 QUESTION: But could the State in those cases
10 show that he would not have received a less onerous
11 sentence? I mean, that's what the contention is here,
12 that by reason of the finding the State has shown that he
13 wouldn't have.

14 MR. ASPERGER: I don't think the State in this
15 case can show that he would not have received a less
16 onerous -- less onerous sentence, because if you put
17 yourself back in the position of the board in 1989, the
18 board is making a prediction of the future, when in fact
19 it may change over time based upon the considerations that
20 are pertinent by the very terms of the statute.

21 And the finding, as I mentioned earlier, is not,
22 no way will he get out, but it's not reasonable to expect
23 that he might get out. That concedes the possibility that
24 things could change during that period of delay, and
25 again, I think it raises the problem of the slippery

1 slope, that as you move further and further along --

2 QUESTION: Nobody concedes the possibility. If
3 it's not reasonable to think that he can get out, it means
4 there's no possibility he can get out.

5 QUESTION: There certainly are prisoners in
6 California, like Charles Manson and whatever -- Sirhan
7 Sirhan -- who have just been up for parole and been
8 repeatedly denied parole, presumably because of the nature
9 of their offenses.

10 Are you saying that the parole board could never
11 make up its mind that, as one of my colleagues said, this
12 guy is a double ax murderer, and we don't care if he's a
13 choir boy in prison, he's not going to get out for a
14 while?

15 MR. ASPERGER: Your Honor, to the extent the
16 prisoner was -- committed his offense between 1977 and
17 1981, which is when this mandatory annual hearing
18 requirement was put into effect, the answer to that
19 question is no, because the statute requires them
20 annually. It requires a present fresh look at all
21 relevant factors.

22 The State didn't have to set up the statute that
23 way in the first place. States are free to set up a
24 parole system that says Charles Mansons are never eligible
25 for parole, but they can't change it retroactively. One

1 way --

2 QUESTION: Under the system, we know, looking
3 back, that Charles Manson has had a number of parole
4 hearings and never gotten out. There must be a class of
5 people in California prisons who are regarded as, just
6 because of the nature of their offenses, they are not
7 likely to be paroled very soon.

8 MR. ASPERGER: There are, Your Honor, but again,
9 they were given that right to have the fresh consideration
10 each year, and in Charlie Manson's case, it may be that
11 they hold that hearing each year and decide, he's not
12 going to get out, but being denied the hearing under
13 California State law as it was set up was something
14 substantive and meaningful as the statute was designed.

15 QUESTION: Well, but then you're getting away
16 from what Justice Breyer called the practical approach.
17 You know, does this really make any difference, and you're
18 saying that because there was something technically there
19 before that's not here now, there has been a violation of
20 the ex post facto clause.

21 MR. ASPERGER: I think that looking even at
22 somebody like Mr. Morales, Your Honor, over time the facts
23 are going to change such that he very well may get out,
24 and statistically, depending upon the individual
25 proclivities of particular boards, prisoners like

1 Mr. Morales did, in fact, get out, so put the hearing
2 ahead 10 years. He's in his sixties. He's no danger. If
3 they made the same finding, it has a real, substantive
4 effect on Mr. Morales.

5 I think it is a mistake to focus solely on the
6 individual offender, or even the categories of offenders
7 when you're talking about the retroactive clause.

8 The core concerns are at the very heart of this
9 statute, because given the current national mood to keep
10 prisoners in jail for longer than they've been in jail, to
11 lock prisoners up for longer periods of time, the State
12 can deal with offenses that are committed in the future,
13 but it can't deal under the ex post facto clause with
14 offenses that were committed in the past unless it tries
15 to do it in this back-door sort of way, by saying we're
16 not going to take away parole, we're just going to take
17 away eligibility, the right to a hearing.

18 Now, I was trying to think about an analogy that
19 might be appropriate, and I think it's very tough, because
20 analogies are dangerous, and they just -- they aren't
21 particularly apropos, but one other way of looking at this
22 might be, for example, if the commissioner of baseball
23 were to change the rules so that the umpire could make a
24 determination in the first instance that this batter has
25 such a lousy batting average, and this pitcher is so good,

1 that I'm going to look at you and call you out before you
2 get up to the plate.

3 That would be a meaningful, substantive change
4 in the rules of baseball, and that is a meaningful change
5 here, not necessarily because Mr. Morales individually
6 would have gotten out at this point in time, but the way
7 the system was set up, this substantive hearing was the
8 essence of the State system.

9 States are free to set up the mechanism for
10 consideration of release however they want. They don't
11 have to require hearings at all. They can leave it to the
12 total discretion of the parole board. They're free to
13 make sentences as long as they want, but they all focus,
14 all of those decisions are related to the key issue, and
15 that is a prisoner's release, and the State has to do
16 that. It has to set the timing of releases in the way
17 that all sentences are handled, and that is prospectively.

18 QUESTION: Release is at the discretion of the
19 parole board, though. Could you -- is there -- could you
20 ever bring a law suit demanding parole when it's been
21 denied?

22 MR. ASPERGER: No, Your Honor, but I --

23 QUESTION: I mean, assuming that -- you know,
24 that the board hasn't said we're denying it to you because
25 you're black, or because you're white, or, you know, for

1 some impermissible reason. It just says, we don't want to
2 give it to you.

3 MR. ASPERGER: No, but the statute here is a
4 step removed. It's the opportunity to be considered for
5 release, and also Weaver recognizes that you don't have to
6 have a vested right or enforceable right to establish a
7 violation of the ex post facto clause.

8 QUESTION: I understand that. It just seems
9 strange to me, though, that the State can deny it
10 absolutely, and you have no recourse, but if they don't
11 give you a hearing every year, you do. It seems strange.

12 QUESTION: Thank you, Mr. Asperger.

13 MR. ASPERGER: Thank you, Your Honor.

14 QUESTION: Mr. Ching, you have 4 minutes
15 remaining.

16 REBUTTAL ARGUMENT OF JAMES CHING

17 ON BEHALF OF THE PETITIONERS

18 MR. CHING: If it please the Court, I have two
19 factual points to make.

20 With regard to Justice Kennedy's inquiry about
21 remedies, there is an administrative appeal available
22 within 90 days for the decision that we have in mind.
23 That is at section 2050 of title 50 in Code of California
24 Regulations.

25 With regard to Justice --

1 QUESTION: Excuse me, administrative appeal from
2 what, from the nonhearing?

3 MR. CHING: No, no, no, the remedy for
4 challenging the order, or finding, that one should
5 postpone.

6 QUESTION: Oh, okay.

7 QUESTION: But I assume it must be taken
8 immediately following that finding.

9 MR. CHING: Yes.

10 QUESTION: It's not an appeal that can be taken
11 a year later saying the finding is no longer good because
12 of intervening circumstances.

13 MR. CHING: Right, and with regard to --

14 QUESTION: What is the time limit for that
15 finding -- for the appeal?

16 MR. CHING: Ninety days, Your Honor.

17 QUESTION: Ninety days.

18 MR. CHING: And then thereafter, of course,
19 there would be -- this would be a prerequisite for the
20 State habeas corpus challenge.

21 With regard to Justice Breyer's comment with
22 regard to the credit, this is not an instance where an
23 individual having received a suitability finding is
24 released the next day. The -- there is in practical terms
25 no short period of time, once a parole date is fixed.

1 For instance, in this case, 10 years, his first
2 hearing, if he had been granted a date at that time, it
3 would be near 19 years or 20 years. We're not talking
4 about 3 or 4 days, and therefore -- and I refer the Court
5 to footnote 2 of my reply brief for the intricacies of the
6 law involved.

7 QUESTION: You mean, if there's a hearing at the
8 end of -- he's been in prison 10 years and the parole
9 board says, yes, we're going to give you parole in 9 years
10 from now?

11 MR. CHING: Yes, that's right, Your Honor,
12 because there are standardized matrices.

13 QUESTION: In other words, would they ever say,
14 we're going to give you parole and you can -- you're going
15 to get out next month?

16 MR. CHING: They could, Your Honor, within their
17 discretion and there would be no one around to challenge
18 that abuse of discretion. However, that is the very
19 purpose of having the matrices which I have included in
20 the supplemental appendix. It is to control that -- and
21 that different kind of discretion, abuse of discretion.

22 QUESTION: Thank you, Mr. Ching -- do you have a
23 question, Justice Breyer?

24 QUESTION: Any empirical idea of how often it is
25 that they grant -- when they grant these things, that the

1 person is actually released within a year?

2 MR. CHING: I would think practically zero.

3 There's no occasion that I know of, and an examination of
4 any of the matrices would indicate a substantial period of
5 time between the initial hearing and your hypothetical of
6 granting of a parole date and the actual date.

7 CHIEF JUSTICE REHNQUIST: Thank you.

8 The case is submitted.

9 (Whereupon, at 1:58 p.m., the case in the above-
10 entitled matter was submitted.)

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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:

CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., Petitioners v. JOSE RAMON MORALES

CASE NO.:93-1462

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

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