

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: HARVEY F. GARLOTTE, Petitioner v. KIRK FORDICE,  
GOVERNOR OF MISSISSIPPI

CASE NO: No. 94-6790

PLACE: Washington, D.C.

DATE: Monday, April 24, 1995

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   HARVEY F. GARLOTTE,                   :

4                   Petitioner                   :

5                   v.                   :   No. 94-6790

6   KIRK FORDICE, GOVERNOR OF                   :

7   MISSISSIPPI                   :

8   - - - - -X

9                                   Washington, D.C.

10                                  Monday, April 24, 1995

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   11:05 a.m.

14   APPEARANCES:

15   BRIAN D. BOYLE, ESQ., Washington, D.C.; on behalf of  
16   the Petitioner.

17   MARVIN L. WHITE, JR., ESQ., Assistant Attorney General of  
18   Mississippi, Jackson, Mississippi; on behalf of the  
19   Respondent.

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1 PROCEEDINGS

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 94-6790, Harvey Garlotte v. Kirk Fordice.

5 Mr. Boyle.

6 ORAL ARGUMENT OF BRIAN D. BOYLE

7 ON BEHALF OF THE PETITIONER

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

10 Petitioner Harvey Garlotte has been confined in  
11 Mississippi since 1985 under a consecutive term of 3 years  
12 imprisonment and two follow-on concurrent life terms.

13 In this habeas action, Mr. Garlotte challenges  
14 the conviction that resulted in the 3-year term, and the  
15 question in the case is whether Mississippi's treatment of  
16 all of Mr. Garlotte's consecutive sentences as a single,  
17 essentially general sentence for penalogical purposes  
18 means that Mr. Garlotte was in custody for purposes of  
19 habeas corpus when he began this action in 1989.

20 QUESTION: What do you mean by saying  
21 Mississippi treated it as kind of a generic sense, or  
22 something like that? I didn't catch your exact phrasing,  
23 but I gather it's something of importance to your  
24 argument.

25 MR. BOYLE: Well, we argue, Mr. Chief Justice,

1 that Mississippi essentially aggregates, or treats as  
2 unitary, a series of consecutive sentences, and by that I  
3 mean the prisoner is assigned a single date of parole  
4 eligibility, which turns on the total period of  
5 confinement, not on the individual sentences, the order in  
6 which those sentences have been prescribed is irrelevant  
7 to the prisoner's release date, and such penalogical  
8 functions as calculating earned time, calculating good  
9 time, those functions are made on the basis of the total  
10 term of confinement, so I analogize consecutive sentences  
11 to a general sentence for multiple convictions.

12 QUESTION: And what is a general sentence?

13 MR. BOYLE: A general sentence --

14 QUESTION: That's simply a single sentence?

15 MR. BOYLE: Your Honor, a general sentence at  
16 common law was a single term of confinement for  
17 convictions upon multiple counts. It raised any --

18 QUESTION: What you didn't have here. They were  
19 consecutive sentences.

20 MR. BOYLE: That's correct, Your Honor.

21 QUESTION: You say Missouri -- Mississippi  
22 treats consecutive sentences much like a general sentence  
23 for multiple con -- would have been treated at common law,  
24 is it?

25 MR. BOYLE: That's basically our point, Your

1 Honor, that for all intents and purposes Mississippi  
2 treats consecutive sentences, administers them as a  
3 general sentence in which --

4 QUESTION: Well, the practical effect is, if the  
5 marijuana conviction were set aside the petitioner would  
6 be entitled to an earlier release date from the remaining  
7 sentence, I gather.

8 MR. BOYLE: That's basically correct, Your  
9 Honor. He would be entitled -- he would be eligible for  
10 release on parole --

11 QUESTION: At an earlier date --

12 MR. BOYLE: At an earlier date, that's correct.

13 QUESTION: -- if this were set aside.

14 MR. BOYLE: That's correct.

15 QUESTION: Was the challenge to the marijuana  
16 conviction brought during the period of time when the  
17 petitioner was still serving a sentence on the marijuana  
18 conviction?

19 MR. BOYLE: Our argument, Justice O'Connor, is  
20 that Garlotte is being held under all of his convictions,  
21 including the marijuana --

22 QUESTION: I know that. I'm asking whether  
23 the -- his challenge to the marijuana conviction was  
24 brought at a time when he was still serving time on the  
25 marijuana conviction, and I would think that would be just

1 a factual thing, yes he did, or no he didn't.

2 MR. BOYLE: Looking at the marijuana sentence  
3 alone, Your Honor, no, he was not marking time on that  
4 sentence.

5 QUESTION: When he first challenged it.

6 MR. BOYLE: When he first brought his Federal  
7 petition, when he first went to Federal court. It's a  
8 matter of debate in terms of when he first went into State  
9 court to exhaust his State remedies.

10 QUESTION: Of course, your position is that he  
11 was serving time on that, because you can't separate the  
12 time on that from the time on the rest.

13 MR. BOYLE: That's precisely our position, that  
14 it's impossible to parse the consecutive sentences that  
15 Mr. Garlotte is serving under, and indeed inappropriate to  
16 do so, because the State doesn't do so for any penalogical  
17 purposes.

18 QUESTION: Well, surely it's not literally  
19 impossible to parse. Maybe it's inappropriate, as you  
20 say, but one can tell a 3-year sentence from a much longer  
21 sentence, I take it.

22 MR. BOYLE: I think that's right, Mr. Chief  
23 Justice.

24 Let me make a slightly different point. I think  
25 the question whether Garlotte is marking time on the

1 marijuana sentence is somewhat separate from the question  
2 whether he's being held under the marijuana conviction,  
3 and as I answered Justice O'Connor's question, looking at  
4 the marijuana sentence alone, he is not -- he was not  
5 marking time on that conviction --

6 QUESTION: That had expired by the time he --

7 MR. BOYLE: Well, the State insists that it  
8 expired at that point.

9 QUESTION: Well, if it was a sentence for 3  
10 years, one can tell simply by looking at State law, I  
11 suppose, whether or not it had expired.

12 MR. BOYLE: Looking at the sentence  
13 individually, that's correct, Your Honor.

14 QUESTION: Yes.

15 MR. BOYLE: But you have a different argument,  
16 as I understand it, based on Peyton. You're saying the  
17 reason the sentences were amalgamated in Peyton in order  
18 to be able to "anticipate" a sentence for purposes of  
19 habeas attack was to satisfy the jurisdictional  
20 requirement that he be in custody.

21 Well, if you can amalgamate in order to  
22 anticipate, the you've got to follow the same  
23 jurisdictional rule when in fact you're looking backwards,  
24 so I think you're -- you have a separate argument saying  
25 you can't have Peyton for jurisdictional purposes and not



1 allow me to attack, i.e. on the basis of custody for  
2 jurisdictional purposes, and that's a separate argument,  
3 isn't it? I mean, that's an argument based on Peyton, and  
4 you're saying you can't have it both ways.

5 MR. BOYLE: That's correct, Justice Souter. The  
6 principle that derives from Peyton is that a prisoner  
7 serving consecutive sentences is in custody under any one  
8 of those sentences for the balance of his confinement.

9 QUESTION: Well, maybe it wasn't principle that  
10 was driving Peyton. Maybe it was a practicality that was  
11 driving Peyton. Why can't you say, you know, the law  
12 makes up these categories. There's no such thing as, you  
13 know, whether it's separate or amalgamated. It's simply  
14 how you choose to look at it, and we choose to look at it  
15 as amalgamated in Peyton in order that you didn't have to  
16 wait a long time before you could try the factual matters  
17 necessary to determine the earlier incarceration, but in  
18 this case that practicality cuts in precisely the opposite  
19 direction, doesn't it?

20 MR. BOYLE: Oh, undoubtedly there were practical  
21 considerations that motivated the Court in Peyton, and  
22 those you described, and it is clear that the rule that we  
23 propose would permit Mr. Garlotte to challenge his  
24 marijuana conviction for as long as he remains in iron bar  
25 confinement in Mississippi, just as it would permit

1 another prisoner serving a life sentence to challenge that  
2 life sentence for as long as he remains confined.

3 But the practical considerations that motivated  
4 the Court in Peyton led to a principle in the case that  
5 obviously spans beyond the narrow factual circumstances  
6 that the Peyton Court confronted, and the principle is  
7 that the prisoner serving consecutive sentence is for all  
8 intents and purposes really serving a general sentence on  
9 multiple convictions, and can bring the petition in time.

10 QUESTION: Was there any rhyme or reason to the  
11 sentence order, Mr. Boyle? I think the prosecutor said he  
12 was indifferent.

13 MR. BOYLE: That's correct, Justice Ginsburg.  
14 At the sentencing hearing the prosecutor expressed total  
15 indifference to the order in which Garlotte would be  
16 required to serve his sentences, and for good reason. It  
17 doesn't matter for purposes when he will -- for purposes  
18 of the most important event for the State and the  
19 prisoner, which is when he might be released into the  
20 community, the order in which those sentences appear in  
21 the commitment order makes no difference.

22 QUESTION: Is there a reason the judge might put  
23 the longer sentence first and the shorter sentence second,  
24 or the other way around, as in this case, the shorter one  
25 first and the longer one second?

1           MR. BOYLE: No reason that occurs to me, except  
2 perhaps -- and we don't make this argument at all here --  
3 except perhaps to foreclose collateral review if we're  
4 wrong here.

5           I think we've canvassed the cases pretty  
6 carefully in Mississippi, and there's no -- appears to be  
7 no rhyme or reason to the order of sentences such as we  
8 have here, a short, fixed period of confinement followed  
9 by a consecutive life term.

10           In many cases, you find the life sentences first  
11 to be followed by the fixed terms of imprisonment, and in  
12 that instance, of course, the prisoner becomes eligible  
13 for parole, eligible for release without having even begun  
14 serving the fixed terms of imprisonment that follow the  
15 consecutive sentences -- follow the life terms, so I think  
16 that provides a handy illustration of how consecutive  
17 sentences really do amount to a general sentence.

18           QUESTION: May I ask -- you've been very careful  
19 each time to say he's eligible for parole earlier if the  
20 shorter sentence is set aside. Is it clear -- what is  
21 Missouri -- Mississippi law on the following hypothesis.  
22 The -- say there's no bail or anything pending appeal.  
23 The person starts serving a sentence immediately, and the  
24 short sentence is fully served before the appeal process  
25 is over, and the appellate court sets aside the short

1 sentence and leaves in place the long sentence. Does he  
2 get an earliest release date then?

3 MR. BOYLE: My understanding of Mississippi law  
4 is that he would.

5 QUESTION: So it's not just eligibility for  
6 parole. He would in fact get the earlier --

7 MR. BOYLE: Right. One of the other features of  
8 consecutive sentences that we point out in our opening  
9 brief is that time served, or time marked under one of the  
10 consecutive sentences is really only provisionally  
11 credited against that sentence.

12 If one of the sentences positioned earlier is  
13 invalidated for any reason, subject -- or pardoned, the  
14 later consecutive sentence sort of slides forward, and the  
15 person gets full credit, and that's another point we make  
16 about -- or another basis for our conclusion that  
17 consecutive sentences really do amount to a single,  
18 general sentence upon multiple convictions.

19 QUESTION: Whereas if you had been sentenced to  
20 that separately and then had been released, and then  
21 committed another crime, and then later it was disclosed  
22 that you didn't actually commit the earlier crime, that's  
23 just tough luck. It wouldn't be credited against your  
24 later sentence.

25 MR. BOYLE: I think it's tough luck, and for

1 this reason. I don't think States want to be in the  
2 position of giving a prisoner an opportunity to bank time  
3 under an unconstitutional conviction they can apply  
4 against a future offense.

5 I've described Mississippi law, and how  
6 Mississippi's position on the custody question is  
7 inconsistent with the statutes that define Mr. Garlotte's  
8 custody, but Mississippi's position is likewise  
9 inconsistent with its own actions in administering Mr.  
10 Garlotte's sentences, and profoundly inconsistent. On the  
11 one hand, we're told that Mr. Garlotte's sentence expired  
12 and was supposedly beyond redetermination, beyond  
13 adjustment, sometime between 1988 and 1986. It's hard to  
14 tell. It depends on when you look at it.

15 But in 1992, pursuant to recently enacted  
16 legislation, the Mississippi Department of Corrections  
17 credited a significant amount of earned time, meritorious  
18 earned time to Mr. Garlotte's confinement. The net result  
19 was that his marijuana sentence was cut in half, and the  
20 Mississippi Department of Corrections credited the time  
21 that was freed up against the life sentences.

22 Now, I don't know how that action can be  
23 reconciled with Mississippi's position here that the  
24 sentence is over and done with and beyond adjustment.

25 The critical point I'd like to make is that the



1 credits that were awarded in 1992 remain reversible, and  
2 for as long as Mr. Garlotte is in iron bar confinement. I  
3 think that illustrates how the marijuana conviction  
4 restrains Mr. Garlotte throughout the aggregate duration  
5 of his confinement.

6 QUESTION: Why is that reversible?

7 MR. BOYLE: The Mississippi statutes which are  
8 cited in the -- or quoted in full in the appendix to our  
9 brief provide for the computation of earned time, or  
10 commutation on the basis of the total period of  
11 confinement when a prisoner is under consecutive  
12 sentences, and separate provisions of Mississippi law  
13 provide for forfeiture --

14 QUESTION: So if he misbehaves later, the earned  
15 time that he got earlier which shorted his marijuana  
16 conviction will be put back on the marijuana --

17 MR. BOYLE: That's right, Your Honor, for as  
18 long as he remains in prison.

19 If he violates -- I can't remember the exact  
20 words, but if he commits a serious violation of prison  
21 rules 20 years from now the State, under my reading of the  
22 Mississippi statutes, can withdraw that earned time, and  
23 in that situation, of course, he will be deemed to have  
24 begun technically serving the life sentences a year-and-  
25 a-half later.

1           Now, Mississippi contends that the so-called  
2 discharge dates of each consecutive sentence must be, even  
3 though they're irrelevant for penalogical purposes in  
4 Mississippi, they have to be treated as sacrosanct by  
5 Federal courts in confronting a habeas challenge.

6           I think that argument is the one that is  
7 foreclosed by Peyton, and quite clearly so. Virginia in  
8 that case tried to block a prisoner from challenging the  
9 second of two sentences -- I think they were 30- and 20-  
10 year sentences -- in that case on the ground that he'd  
11 only been in prison a few years and hadn't yet begun to  
12 serve the second term.

13           Observing that the prisoner in that case had a  
14 single parole date under Virginia law, the Court held that  
15 he was for all practical terms serving a 50-year sentence  
16 and it would be treated as such for habeas purposes.

17           Essentially, what the Court held is that the  
18 sentence under which a prisoner is technically marking  
19 time is -- that question whether the prisoner is marking  
20 time under the challenged sentence is a separate one from  
21 whether he is held or in custody under the conviction, and  
22 that's amplified by some of the Court's other decisions,  
23 Hensley v. Municipal Court, Estelle v. Dorrough, and  
24 Braden v. 30th Judicial District Court, which permit a  
25 prisoner to challenge confinement that he is scheduled to

1 serve in another jurisdiction before that -- before he's  
2 begun to serve that confinement.

3 I think the theory is that in that situation the  
4 prisoner is not only being held by the first jurisdiction  
5 to discharge the first sentence, but he's also being held  
6 in anticipation of serving another sentence.

7 Mississippi relies a great deal on Maleng v.  
8 Cook, and submits that the issue has already really been  
9 decided in Maleng, but all Maleng held was that a sentence  
10 or a conviction that no longer poses any present  
11 restraints on a prisoner does not become a source of  
12 custody for purposes of Federal habeas corpus simply  
13 because it's been used to enhance a sentence upon a  
14 subsequent conviction.

15 QUESTION: Do you think it's fair to say,  
16 Mr. Boyle, that neither Maleng nor Peyton cover the facts  
17 of this case, that one is on one side and one is on the  
18 other?

19 MR. BOYLE: I think that's fair, Your Honor.  
20 The actual facts of Peyton were such that the prisoner had  
21 not yet begun to serve the sentence he was challenging.

22 QUESTION: And the actual facts of Maleng were  
23 that the sentence had been served and was not affecting  
24 his present custody at all.

25 MR. BOYLE: That's correct, but the sentence at

1 issue in that case was not imposed consecutively. There  
2 was no basis to conclude that the earlier sentence that  
3 had been used, or earlier conviction that had been used to  
4 enhance the subsequent sentence was somehow aggregated or  
5 combined into a single sentence by the jurisdiction for  
6 purposes of such things as parole eligibility,  
7 commutation, and so forth.

8 The only continuing influence of that prior  
9 conviction, in fact, was the prisoner's status as a felon,  
10 which was obviously influential to the sentencing judge in  
11 the subsequent conviction in seeing that the prisoner is a  
12 danger and thus enhancing the sentence.

13 I think the principle to be derived from Maleng  
14 is that in that situation where a prior fully expired  
15 conviction is used to enhance a sentence for a subsequent  
16 offense, that the source of the prisoner's injury and the  
17 proper object of his habeas petition is that subsequent  
18 sentence, that subsequent conviction, and that's in fact  
19 what the Court held in that case. The Court found  
20 jurisdiction over the claims in the case, but albeit  
21 through the subsequent offense and subsequent sentence.

22 Now --

23 QUESTION: Mr. Boyle, I'm concerned about the  
24 practical effects of what you urge us to do here. That  
25 is, about opening up to challenge very stale, very stale

1 convictions on the basis of evidence that's, I mean, 20,  
2 30, 40 years old.

3           You're saying anyone who's serving under  
4 consecutive sentences can now go back, even though he  
5 didn't raise the challenge at the time, and challenge a  
6 sentence, 2, 3 year sentence that he served at the  
7 beginning of his incarceration. Why would we want to  
8 create that kind of problems for the State and Federal  
9 courts if, as you say, none of our decisions squarely  
10 requires us to do that?

11           MR. BOYLE: I agree that, Your Honor, that  
12 concerns about delay are legitimate concerns. I don't  
13 think they're present here. The State doesn't argue that  
14 Mr. Garlotte delayed inexcusably his habeas petition here,  
15 and I think our position is that the jurisdictional scope  
16 of the statute, which Congress delimited in terms of  
17 confinement, in terms of custody such that a prisoner  
18 serving a life sentence could conceivably wait 40 years  
19 before bringing a habeas challenge --

20           QUESTION: Well, I take it, Mr. Boyle, Rule 9(a)  
21 mitigates that argument somewhat in that a petition can be  
22 dismissed if there's been lack of diligence in filing --  
23 if the State -- at least if the State can show prejudice,  
24 I believe, under that rule.

25           MR. BOYLE: Absolutely, Your Honor, and so I



1 would regard the jurisdictional question as ill-suited  
2 to -- or the jurisdictional inquiry as ill-suited to try  
3 to deal with concerns about delay. It seems Rule 9(a) is  
4 a perfectly fitted remedy.

5 I'd make another point, and that is where you  
6 have a prisoner serving a continuous period of confinement  
7 under multiple convictions there is -- there's no real  
8 incentive for a prisoner to delay bringing his habeas  
9 claims. Each day that passes is potentially another day  
10 in unconstitutional confinement. Each day that --

11 QUESTION: Certainly the Court in Peyton used  
12 the jurisdictional analysis to solve a practical concern,  
13 didn't it? That suggests that the jurisdictional statute  
14 may not be regarded as like the twelve tablets, so to  
15 speak.

16 MR. BOYLE: I don't contend that practical  
17 considerations are irrelevant here.

18 QUESTION: But do you take the position that  
19 Peyton does not control?

20 MR. BOYLE: I think, Justice Souter, the  
21 principle of Peyton does control this case, the principle  
22 being that a prisoner serving consecutive sentences is in  
23 custody under each conviction supporting those sentences  
24 throughout the aggregate duration of the confinement.

25 QUESTION: So you are saying we cannot rule

1 against you without overruling Peyton.

2 MR. BOYLE: Without overruling or modifying its  
3 principle. I think that's right.

4 There are practical considerations to point out  
5 in Mississippi's position as well. I'll mention a few of  
6 them. The first is that the rule sought by Mississippi  
7 would make the availability of redress for constitutional  
8 claims turn arbitrarily and capriciously on the order in  
9 which those sentences are positioned in the commitment  
10 order, and for no real reason, when the State concedes  
11 that the order in which they are to be served makes no  
12 difference for important penalogical events.

13 QUESTION: But I think you would have a hard  
14 time justifying your characterization of that as  
15 arbitrary, saying that you have to challenge a sentence  
16 during the time in which you're serving it.

17 Now, your argument may be that the statute  
18 permits that, which I understand, but I don't think  
19 it's -- I think it's hard to say it's arbitrary if it  
20 doesn't permit it, to simply say, you had a sentence for  
21 3 years imposed upon you and you have to challenge it  
22 during the time you're serving that sentence.

23 MR. BOYLE: Our threshold position, Mr. Chief  
24 Justice, is that each of the convictions supporting the  
25 consecutive sentences poses a present restraint throughout

1 the duration of confinement, and in light of that I think  
2 that permitting the availability of redress to turn on the  
3 order in which the sentences appear in the commitment  
4 order when that order makes no difference for purposes of  
5 -- for penalogical purposes in Mississippi would, indeed,  
6 be arbitrary.

7 Another effect of the rule sought by Mississippi  
8 is that it would place prisoners' constitutional claims at  
9 the mercy of the exhaustion process. A prisoner who moved  
10 diligently to exhaust his State remedies and that  
11 exhaustion process for whatever reason did not conclude  
12 prior to the technical expiration or the so-called  
13 discharge date of the first consecutive sentence would be  
14 foreclosed from habeas relief.

15 QUESTION: Of course, that happens when a  
16 prisoner hasn't gotten any more than the one sentence as  
17 well. I mean, if he ends up and serves his 3 years and it  
18 serves more than 3 years for the habeas proceedings to be  
19 completed, it's then too late to get any habeas relief.  
20 He served his time, it's water over the dam, and he can't  
21 challenge that conviction any more --

22 MR. BOYLE: That's true, Your Honor, but here,  
23 of course --

24 QUESTION: -- even if it has continuing future  
25 effect, at least for purposes of recidivism and so forth.

1           MR. BOYLE: But the difference here, Your Honor,  
2   is that the marijuana conviction will pose restraint on  
3   Mr. Garlotte, will have custodial, real custodial effects  
4   on Mr. Garlotte throughout the time he is confined in  
5   Mississippi, an iron bar confinement, and in that  
6   circumstance, I think it's unfair to leave those -- the  
7   claims he may have against that conviction at the mercy of  
8   the exhaustion process.

9           The final point, from a practical perspective,  
10  is that it would -- the rule sought by Mississippi would  
11  put courts in the sometimes confounding position of trying  
12  to figure out -- trying to parse consecutive sentences and  
13  trying to figure out when confinement ends under one and  
14  begins under another. This case is a perfect example,  
15  where the technical discharge date of Mr. Garlotte's  
16  marijuana conviction swung wildly from '88 to '86. It may  
17  swing back again.

18           There's no reason to take on that burden when  
19  the State doesn't do so for purposes of administering its  
20  penal system and when nothing of importance penalogically  
21  turns on those technical discharge dates. It would be --

22           QUESTION: How would this rule be applied in  
23  States other than Mississippi? I mean, I suppose you're  
24  going to have some variations, maybe 50 variations.

25           MR. BOYLE: There may be some, Mr. Chief

1 Justice, and there may -- those variations may have  
2 significance for purposes of the Federal question, but my  
3 understanding of Mississippi's rules is that these are the  
4 customary rules under which consecutive sentences are  
5 administered, for good reason.

6 The State doesn't want to risk having a prisoner  
7 paroled on the first conviction and sentence before he  
8 begins to serve another conviction and sentence. The  
9 State doesn't want to put itself in the position of having  
10 a prisoner released because the first sentence is  
11 invalidated or pardoned pending the service of other  
12 sentences. It wants a continuous period of confinement,  
13 and so I think the --

14 QUESTION: I'm not sure why that would happen.  
15 If he's -- let's assume that in this case the marijuana  
16 conviction was set aside. Why wouldn't he just be  
17 automatically held under any sensible procedure for the  
18 next consecutive sentence, or am I missing something?

19 MR. BOYLE: Under consecutive sentences he  
20 would, Justice Kennedy, and that's because the  
21 commencement date for each subsequent consecutive sentence  
22 is a function of the termination date of the prior. If  
23 the sentences were truly separate, if they were -- if they  
24 each had separate, fixed beginning and end dates, you  
25 could imagine a situation in which a prisoner would be



1 eligible for parole and might get parole, be in the  
2 community, before he was called to serve the subsequent  
3 sentences.

4 QUESTION: Oh, I see.

5 MR. BOYLE: So the State sees real advantages in  
6 aggregating, amalgamating consecutive sentences and  
7 treating them as a general sentence, and our submission is  
8 that, given that election, Mississippi has to accept the  
9 consequences that turn on long periods of confinement.

10 The State I don't think should be permitted to  
11 resurrect artificial discharge dates as a means of closing  
12 habeas review when those discharge dates have absolutely  
13 no meaning under the penal system.

14 If there are no further questions, I'd like to  
15 reserve the balance of my time.

16 QUESTION: Very well, Mr. Boyle.

17 Mr. White, we'll hear from you.

18 ORAL ARGUMENT OF MARVIN L. WHITE, JR.

19 ON BEHALF OF THE RESPONDENT

20 MR. WHITE: Mr. Chief Justice, and may it please  
21 the Court:

22 There are two basic arguments here, and the  
23 argument that we are looking at is the extension of Peyton  
24 v. Rowe to this particular situation. Peyton was decided  
25 to take care of a specific situation, the overruling of

1 McNally v. Hill, which had set up a rule of prematurity in  
2 the bringing of a habeas petition for sentences to be  
3 served in the future.

4 The circuits that have decided contrary to the  
5 Fifth Circuit have grasped on the language found in the  
6 last paragraph of the opinion without any analysis of the  
7 reason for Peyton to be decided.

8 QUESTION: Well, regardless of the reason, what  
9 happened in Peyton was that the Court said you could  
10 aggregate the sentences and a habeas challenge would lie  
11 immediately, even to one that technically hadn't started  
12 to run yet.

13 MR. WHITE: That's correct.

14 QUESTION: And if you apply that principle here,  
15 then there is jurisdiction even though the marijuana  
16 conviction sentence has expired because it has an effect  
17 on the length of time the prisoner will actually serve on  
18 the second conviction.

19 MR. WHITE: But that was not the basis of  
20 Peyton. Peyton was to --

21 QUESTION: There were reasons given, but it  
22 nonetheless adopted a principle of aggregating them and  
23 letting the habeas challenge be brought.

24 MR. WHITE: But the Court repeatedly said, for  
25 sentences to be served in the future, not in the past. I

1 mean, we have a different factual situation --

2 QUESTION: No, but Peyton was construing a  
3 statute, and it was construing the word "custody" in the  
4 statute, and it said that term is going to be construed on  
5 the theory of in for one sentence, in for all, and I don't  
6 see how that construction can vary depending on whether we  
7 are looking forward or whether we are looking backward.

8 This isn't a question of just common law  
9 policymaking that the Court was going through here. It  
10 was going through statutory construction, and I don't know  
11 why we are not bound by it under the normal rules of stare  
12 decisis.

13 MR. WHITE: Well, we contend that it's a totally  
14 different fact situation, and that it is -- the basis --

15 QUESTION: So you're saying, therefore, or  
16 you're implying that the same word in the same statute has  
17 radically different meanings, depending on whether we look  
18 forward or whether we look back?

19 MR. WHITE: Absolutely.

20 QUESTION: That's a tough row to hoe.

21 MR. WHITE: Absolutely.

22 QUESTION: Can you explain how we have that  
23 freedom?

24 MR. WHITE: If the sentence has already been  
25 served, he is not in custody on that sentence any longer.

1 QUESTION: No, but you're -- it's fine to say  
2 that, but you're in effect rejecting the premise of the  
3 question. The question's premise is, we've already  
4 construed custody to say, all consecutive sentences are  
5 continuous, to be regarded as one for purposes of what is  
6 custody under this statute.

7 How do we have an option to say, in fact, we  
8 were wrong, that only applies when we are looking forward?  
9 That isn't what we held, and I don't see how, in  
10 principle, we could redefine the identical term in the two  
11 circumstances.

12 MR. WHITE: Well, I don't -- and of course I  
13 don't read Peyton that broadly, as being the answer to the  
14 whole question. I mean, it -- in the last --

15 QUESTION: No, you see --

16 MR. WHITE: -- paragraph, I think --

17 QUESTION: -- not broadly, but the Court did not  
18 say, for purposes of looking forward statutes are -- or  
19 sentences are continuous. It said, sentences are  
20 continuous, period.

21 MR. WHITE: In that last paragraph.

22 QUESTION: And therefore we can look forward.

23 MR. WHITE: In the last paragraph. Every other  
24 time it mentions about, in the future.

25 QUESTION: Well, it --

1 MR. WHITE: In the future, in the future.

2 QUESTION: It went through -- I just skimmed  
3 Peyton again. I mean, Peyton has sort of two parts, in a  
4 way. It has a policy and it has a -- well, three parts, I  
5 guess.

6 It has a historical analysis, then it has a kind  
7 of policy analysis of considerations, and then, in its  
8 concluding section, it draws the lesson that Mr. Boyle  
9 relies upon and, perfectly true, it says in the policy  
10 analysis we're worried about the value or lack of value in  
11 looking ahead, but when it gets to construe the statute it  
12 says, custody means a continuity of sentences, and it -- I  
13 don't -- you -- I don't see how we could hold your way  
14 without saying that the term is going to have different  
15 meanings depending on whether we look forward or look  
16 back.

17 And there may be policy reasons for wishing it  
18 did, and they are in part addressed by the point that  
19 Justice Kennedy made, but regardless of policy reasons for  
20 wishing it could, we're still faced with the fact that  
21 we've only got one word in one statute, and I don't see  
22 how it can have two meanings.

23 MR. WHITE: Well, the policy considerations  
24 certainly weigh heavily in this case, because once this  
25 Court says that it can retroactively do so, somebody that



1 has been, even with Justice Kennedy's concern, or I mean,  
2 comment about Rule 9, this does not mean that these people  
3 can't raise these claims that are 40 years old.

4 You know, even -- the case --

5 QUESTION: Well, it does but --

6 MR. WHITE: The question that's --

7 QUESTION: It does, but your argument suggests  
8 that there is somehow an inducement for their delay, and I  
9 don't see that, because I don't see why the inducement is  
10 not likely to work against them. I would suppose the  
11 inducement would be, if they really have a claim, to get  
12 it out and get it litigated. If they don't have a claim,  
13 they're not going to be any better off 40 years later.

14 MR. WHITE: Well, this very petitioner belies  
15 this whole argument about not delay, of the lack of delay  
16 that they make, saying that everybody's going to rush in  
17 and file their habeas as quick as they can. His State  
18 remedies were exhausted on two consecutive murder  
19 convictions that he's serving now in 1992. He has yet to  
20 file a habeas claim on those cases. This is not something  
21 that we don't see every day in dealing with habeas cases.  
22 They wait 10, 15 years, and all of a sudden --

23 QUESTION: Well, you're not contending that he  
24 lacked diligence in filing this petition, are you?

25 MR. WHITE: No. He filed this --

1 QUESTION: All right.

2 MR. WHITE: But he had already -- his sentence  
3 had expired in this case and, of course, they say -- the  
4 petitioner is arguing that aggregate sentences don't make  
5 any difference under Mississippi law, that they're all  
6 amalgamated. Well, they're not. We only have to look at  
7 page 54 of the Joint Appendix to see.

8 Why, if they didn't make any difference, why  
9 would the State of Mississippi or the Department of  
10 Corrections produce something there that has a parole  
11 eligibility date and a discharge date on it for each  
12 sentence?

13 QUESTION: Well, his point is that that's just a  
14 paper distinction.

15 What would happen if he files promptly in habeas  
16 and the case goes all the way through State courts and it  
17 gets up to our Court 3-1/2 years later, and because he's  
18 acquired a half-year's worth of good time, 3-1/2 years is  
19 1 day later than his term expired? We'd have to dismiss  
20 the case.

21 MR. WHITE: No.

22 QUESTION: It's moot, right?

23 MR. WHITE: Not under Coffey v. LaVallee. I  
24 mean, if he filed it while he was in custody he's -- then  
25 it continues.

1 QUESTION: Suppose he files it 3-1/2 years plus  
2 1 day, all right? Then he's out?

3 MR. WHITE: That's right.

4 QUESTION: What if the good time that he's  
5 earned on his 4-year sentence is later restored?

6 MR. WHITE: Is later --

7 QUESTION: Right.

8 MR. WHITE: -- restored?

9 QUESTION: He's still serving his sentence. He  
10 has this 4-year sentence plus two life sentences  
11 afterwards, and he's gotten a half-year's worth of good  
12 time credits on his 4-year sentence, so he files his  
13 habeas action during that period that's been eliminated.

14 MR. WHITE: Oh, and it --

15 QUESTION: By virtue of his good time credits.

16 MR. WHITE: And it's later taken away, is what  
17 we're saying.

18 QUESTION: And it's later restored -- yes,  
19 right. I mean, the good time credits are --

20 MR. WHITE: That's what I didn't understand.

21 QUESTION: -- later eliminated. Does it  
22 retroactively --

23 MR. WHITE: No.

24 QUESTION: -- become a timely habeas petition?

25 MR. WHITE: No, and --

1 QUESTION: It doesn't? Why not? He's served  
2 4 years on it. He filed it within the 4-year period.

3 MR. WHITE: I was not saying no to your  
4 question, there.

5 QUESTION: Oh.

6 MR. WHITE: I'm saying that retroactively we  
7 don't take away good time as a matter of policy.

8 QUESTION: Oh, just policy.

9 MR. WHITE: Of course, there's been no --

10 QUESTION: The statute permits it, I see.

11 MR. WHITE: There's been no evidentiary hearing  
12 in this case to bring out the -- these ifs, ands, and buts  
13 in the interpretation of the statute, in the application  
14 there, but that doesn't happen, you know. The hundred  
15 and -- the time that he has, good time on this, will not  
16 be taken away from him.

17 QUESTION: It is permissible for that to happen,  
18 isn't it, during his entire time of incarceration?

19 MR. WHITE: Under the statute, but the practice  
20 and procedures right now that are in effect and every  
21 decision of our supreme court has said that any benefit,  
22 and that's why it's been refigured, is that the benefit  
23 goes to the --

24 QUESTION: Well, if you wrote the statute  
25 differently so that what you do is in fact what you --

1     only what you can do, then we'd have a different case. We  
2     might have a case where we don't have one unitary  
3     sentence, as counsel for the petitioner is saying.

4             MR. WHITE: Well, our supreme court has held  
5     that they're not unitary, though.

6             QUESTION: Well, but your supreme court has not  
7     held that you can't take away good time credits previously  
8     given. You can. You just tell me you don't do it. Well,  
9     the fact that you don't do it doesn't establish what kind  
10    of a sentence you have. It's just a practice.

11            MR. WHITE: Well --

12            QUESTION: I'm troubled by the fact that this  
13    thing can be filed in a manner that's declared to be  
14    untimely and then retroactively it can be rendered timely.  
15    You tell me, well, you don't do it. Well, that's nice of  
16    you, but it doesn't fit with the theory of the case, it  
17    seems to me.

18            MR. WHITE: Well, the point being that if it, at  
19    some later point it did, I think that that -- you know, he  
20    could then file. It could be timely. But at the time, if  
21    we have a situation where this is not -- his sentence has  
22    expired, and the -- just as the discharge date in this  
23    case, it is passed. It was long passed.

24            QUESTION: Could he say thanks but no thanks to  
25    the good time because I want to challenge the sentence.



1 If I don't get the good time, my time -- I'll still be  
2 under the first sentence?

3 MR. WHITE: It is credited -- well, there are  
4 two types. There's earned good time and meritorious good  
5 time. They are two different animals. They get confused.  
6 Now, when you enter in on a sentence, you are given  
7 credit. As of 1992, you're given credit for half the  
8 sentence that you will serve, are sentenced to serve, and  
9 at any time during your sentence, parts of that can be  
10 taken away.

11 QUESTION: You mean, if you're sentenced to 10  
12 years, and you start serving your sentence on March 1st,  
13 1995, you are said to have a 5-year sentence?

14 MR. WHITE: That's right.

15 QUESTION: Is there any rhyme or reason to do  
16 the order of these sentences? The prosecutor was  
17 indifferent, and Peyton we have an example of the shorter  
18 sentence second. In this one, the shorter sentence is  
19 first.

20 MR. WHITE: Certainly. In this particular case,  
21 if you're sentenced to a life sentence you don't get  
22 that -- there are exceptions to the half-time credit. He  
23 would have had no good time at this point at all. He  
24 would not be -- start receiving any good time or  
25 meritorious earned time until next month, or June of this

1 year.

2 He would -- you know, the 10 years on a life  
3 sentence is day for day, without any reduction, and then  
4 if that -- when that parole eligibility date is reached  
5 for the murder conviction, then the marijuana conviction  
6 would start to be served, and then he would be entitled to  
7 the meritorious earned time and statutory earned time,  
8 good time.

9 QUESTION: May I ask as a matter of Mississippi  
10 law, what is the condition that must be met in order to  
11 file a collateral attack in Mississippi? Is custody the  
12 standard there, too?

13 MR. WHITE: Yes.

14 QUESTION: And would that mean that as a matter  
15 of Mississippi law he would be too late to attack his  
16 sentence, or has that not been decided?

17 MR. WHITE: Well, of course, he timely filed it  
18 here, within the 3-year -- we have a 3-year statute of  
19 limitations from the time that you enter a guilty plea or  
20 the time the State supreme court decides it's a case on  
21 direct appeal.

22 QUESTION: It's a 3-year statute or limitations  
23 regardless of the length of the sentence?

24 MR. WHITE: Regardless.

25 QUESTION: I see.

1 MR. WHITE: And if you don't bring it within the  
2 3 years, it's -- you know -- there are some exceptions.

3 QUESTION: Yes.

4 MR. WHITE: I mean, there are exceptions to the  
5 statute, but basically we have a 3-year statute of  
6 limitations.

7 QUESTION: Well, if you were within one of the  
8 exceptions, would you be able to file after the 3 years --  
9 after the short sentence had expired? In other words, do  
10 you have a rule in Mississippi such as the one you're  
11 contending should apply in Federal court?

12 MR. WHITE: That -- I mean, if he -- if his time  
13 has been served, he --

14 QUESTION: It's too late in this --

15 MR. WHITE: He's out of court.

16 QUESTION: It's --

17 MR. WHITE: It's too late. I mean, if he has a  
18 1-year sentence, you know --

19 QUESTION: Right.

20 MR. WHITE: And he serves that 1-year sentence,  
21 he can't wait 2 more years to attack that -- collaterally  
22 that 1-year sentence.

23 QUESTION: So the statute of limitations is a  
24 necessary but not a sufficient condition for the habeas  
25 petitioner to meet. If -- even though he's within the 3-

1 year statute of limitations, if he's -- if the -- his  
2 sentence has already expired, he can no longer challenge  
3 it in State collateral --

4 MR. WHITE: That's correct. So you know --

5 QUESTION: But there's no statute on Federal  
6 habeas.

7 MR. WHITE: No, not yet.

8 And of course in this particular case the State  
9 contends that we -- the aggregate sentences do make a  
10 difference, as I was explaining there, that they -- the  
11 order in which they're served, and in this particular  
12 case, under petitioner's theory, that he would be able  
13 basically to challenge this marijuana conviction for the  
14 rest of his life.

15 Because in Mississippi if you're sentenced to  
16 life, you're sentenced to life, while even though you are  
17 eligible for parole in 10 years and may get out of jail,  
18 under Mississippi law you stay under a sentence of life  
19 for the rest of your life, and therefore he would have  
20 been able to challenge this marijuana conviction until the  
21 day he died.

22 QUESTION: Well, he's able to challenge his life  
23 sentence conviction for the rest of his life.

24 MR. WHITE: Well, that's true.

25 QUESTION: Right?

1 MR. WHITE: That's correct.

2 QUESTION: What's wrong with being able to  
3 challenge this other one for the rest of his life, if,  
4 indeed, the two are sort of mish-mashed together, and he's  
5 serving them all together --

6 MR. WHITE: Well, they're -- the thing is  
7 they're --

8 QUESTION: -- each having an effect on the  
9 other.

10 MR. WHITE: They're separate convictions for  
11 separate crimes.

12 You know, I can understand that a life sentence,  
13 because of the collateral consequences of that that extend  
14 throughout the life of being basically, I think  
15 technically in custody for the rest of your life, whether  
16 you're behind bars or not, and the marijuana conviction,  
17 this 3-year sentence, you're saying because I'm in for  
18 this one I get a free ride on this one, and whereas if a  
19 person --

20 QUESTION: Or if this is put last.

21 MR. WHITE: Or we put it --

22 QUESTION: You acknowledge if the short sentence  
23 were put after the life convictions he would have been  
24 able to challenge that short sentence for his entire life,  
25 both when he originally --



1 MR. WHITE: Right.

2 QUESTION: -- went in and later when he was  
3 serving it.

4 MR. WHITE: Right. But there again is the  
5 reason we do that is because we want that speedy  
6 resolution of that -- those future sentences, so we don't  
7 wait for 40 years or 20 years or -- to determine these  
8 cases, and that's why -- I mean, that's the State's  
9 position here, is that this actually turns Peyton on its  
10 head, because it invites delay and not -- in this case,  
11 and you know, and as I say, in this very case is an  
12 example of that, where he has not challenged his life  
13 sentences in Federal court, although his State court  
14 remedies were exhausted on May 2nd, 1992.

15 QUESTION: Maybe he has no reason to challenge  
16 those life sentences, and his reason is only to challenge  
17 the marijuana sentence, as to which you're not making any  
18 claim of lack of diligence. The problem was, he had to  
19 exhaust his State remedy. That's why he didn't get to  
20 Federal court.

21 MR. WHITE: Well, that happens every day, that  
22 people exhausting their --

23 QUESTION: But there's no lack of diligence.  
24 You were making an argument that this is an example of  
25 lack of diligence because he still hasn't challenged his

1 murder convictions on --

2 MR. WHITE: No, that was not the argument I was  
3 making. The argument that this is -- shows that this does  
4 not happen. Everybody is not going to rush in and file  
5 their habeas petition as soon as possible on every case,  
6 and the parallel case with this, the consecutive sentence,  
7 that's not happened yet.

8 We're not saying that he did not, as soon as  
9 his -- well, and he really didn't file this. He filed  
10 some more dilatory State pleadings instead of, after a  
11 determination of the State post conviction petition by the  
12 Mississippi supreme court, he filed a second one, a second  
13 petition in State court alleging the very same issues that  
14 had just been denied instead of going on and filing his  
15 Federal habeas.

16 I mean, that's -- it's quite often done, and  
17 that's -- I mean, it's not -- it was not a long delay, of  
18 about a year, maybe, that he took to file his second  
19 almost identical petition in State court, but this -- you  
20 know, this delayed his time, and this was, you know, his  
21 choice to file this instead of going into Federal court,  
22 because he exhausted his issues in that first petition --

23 QUESTION: Is --

24 MR. WHITE: -- and basically reexhausted them in  
25 the second petition and wasted a year's time filing a

1 second petition in State court. So I mean -- and I don't  
2 even know if the -- thinking back now, I don't know  
3 whether the -- if he had filed within that first time he  
4 would have still been within his -- within the time that  
5 he was serving the marijuana conviction, but that did  
6 happen.

7 I mean, this happens quite often, and so of  
8 course by looking at it this way I think we turn the rule  
9 in Peyton, jurisdictional rule in Peyton upside down when  
10 we say that you can go back and challenge sentences that  
11 are fully served, even though there's an aggregate, they  
12 aggregate in the future, and I think that that's certainly  
13 the way it should be viewed.

14 QUESTION: Do you think that there is a way --  
15 suppose you thought -- I'm just trying this one. I don't  
16 know your reaction, but suppose you thought that Peyton  
17 and these other cases means yes, these sentences are all  
18 smushed together somehow, so is there still a difference  
19 between the period of time where the two sentences  
20 combined means that he has to be confined -- in this case  
21 that's 10 years and 10 months -- and then the period of  
22 time after that.

23 In other words, suppose 10 years and 10 months  
24 runs --

25 MR. WHITE: As it will.

1 QUESTION: As it will, and then that day comes,  
2 and then he isn't released.

3 MR. WHITE: He's not going to be.

4 QUESTION: Right. Now, what I wonder is --

5 MR. WHITE: Under the present --

6 QUESTION: -- after that day comes and goes,  
7 then if he wanted to challenge that first sentence,  
8 intuitively that seems much more like the case where a  
9 person's been out for awhile, and at worst what happens is  
10 that that earlier sentence is sort of taken into account  
11 as an aggravating factor in his life that stops parole,  
12 whereas before that 10 years and 10 months runs, it seems  
13 much more like that that earlier sentence is having an  
14 active effect at forcing him to be confined for an  
15 additional 10 months.

16 Now, I don't know if there is a way conceptually  
17 of taking that into account or not. That's what I'm --  
18 I'm wondering what your view is.

19 MR. WHITE: Under -- petitioner's theory is that  
20 he is still, will be on parole for the marijuana sentence  
21 at the same time he is on parole for the murders if and  
22 when he ever gets out --

23 QUESTION: Yes. Yes, I know that's his theory.  
24 That's why I thought --

25 MR. WHITE: -- and that -- and so therefore he

1 contends that that collateral consequence of being on  
2 parole extends whether it's 10 or 15 or 20 years before  
3 Mr. Garlotte is released from custody. I mean, it's --  
4 presently the set-off is -- on the first time of  
5 eligibility for parole is anywhere from 3 to 5 years right  
6 now, and --

7 QUESTION: That's why I wanted to know what you  
8 thought. What do you think about that? I mean, is there  
9 some distinction possible there, or not?

10 MR. WHITE: Of course, our argument is that when  
11 he served --

12 QUESTION: Yes, I know.

13 MR. WHITE: -- that he was required to on the  
14 marijuana conviction.

15 QUESTION: Right. Right.

16 MR. WHITE: And we have a -- in the penitentiary  
17 recs we have an earliest parole date and discharge date.

18 QUESTION: Right.

19 MR. WHITE: I mean, in the records there that  
20 are presented to the inmate, and there is a mistake in the  
21 one here, as we pointed out in the footnote, and as  
22 Mr. Garlotte points out to the Court in his petition for  
23 certiorari on page 9 and 10.

24 I mean, he realizes that this paper, because of  
25 a clerical error, is in error, and he's actually not to be



1 released until some 2 months later than they have listed  
2 there. His earliest parole date is not listed because of  
3 a clerical error in applying --

4 QUESTION: Yes, yes, but I mean, if you lost on  
5 your basics theory you'd still prefer that he lose his  
6 right to challenge the initial conviction once the  
7 10 years and 10 months comes to pass.

8 MR. WHITE: Oh, absolutely.

9 QUESTION: And so I wondered if there -- if  
10 you've thought of -- you might -- you probably haven't  
11 thought about it. I haven't thought it through, but if  
12 there is some way conceptually that that would work.

13 I mean, I see an intuitive difference, and I'm  
14 not sure if it works out in the context of the cases.

15 MR. WHITE: Yes. I mean, I think that  
16 there's -- you know, there's a way to do that. Of course,  
17 we'd rather have the whole loaf than half in this  
18 situation, and our concern, too, is that the -- is this  
19 going to be retroactively applied to all habeas  
20 petitioners?

21 I mean, even in the face of Rule 9 it's going to  
22 create -- could create a tremendous work load on our  
23 office to have to answer all these things. I mean,  
24 it's -- there's one thing to assert jurisdiction and say  
25 the court has no jurisdiction, and a total -- a totally

1 different one to have to go into a Rule 9 situation where  
2 you may have to answer the total thing and do an extensive  
3 search for records and transcripts and things like this  
4 that may be very, very old or may not even be extant, so  
5 when you have a jurisdictional bar you are on a much more  
6 solid ground than you are on a Rule 9 bar in a habeas  
7 situation.

8 QUESTION: General White, have you finished your  
9 argument, because I wanted to ask you one question --

10 MR. WHITE: Yes.

11 QUESTION: -- not directly related to the case.

12 I'm just curious, because you've had a good deal  
13 of experience in these cases, do you think the general  
14 exhaustion rule is a sound rule?

15 MR. WHITE: Yes, I think it is. I think the  
16 State court should have first crack at it, and I think  
17 that --

18 QUESTION: You think that outweighs the delay  
19 that it causes, is the question that runs through my mind?

20 MR. WHITE: Well, you know, if -- in our Federal  
21 system, yes, I think it outweighs heavily the fact that  
22 the -- the State courts are catching most of these things,  
23 and they're making corrections in these cases and  
24 vacating -- I know I, my court has changed, in the 17  
25 years I've been with the Attorney General's Office has

1 changed, where it was a perfunctory denial on post  
2 conviction rules, where they're seriously considered, and  
3 many, many vacations of sentences are -- you know, you see  
4 opinions written in post conviction cases where you didn't  
5 used to see that.

6 QUESTION: Yes.

7 MR. WHITE: There were many, many just  
8 perfunctory denials.

9 QUESTION: Thank you very much.

10 MR. WHITE: Thank you.

11 QUESTION: Thank you, Mr. White.

12 Mr. Boyle you have 2 minutes remaining.

13 REBUTTAL ARGUMENT OF BRIAN D. BOYLE

14 ON BEHALF OF THE PETITIONER

15 MR. BOYLE: Thank you, Mr. Chief Justice.

16 I'd like to make just a couple of points.

17 First, on the question whether it would be possible to  
18 parse consecutive sentences according to whether the  
19 prisoner is marking time in those sentences, another  
20 thought occurred to me, sitting down, and this is  
21 amplified in the briefs.

22 In Mississippi, as I think in most States, the  
23 sentences are really discharged in dovetail fashion, so  
24 that when Mr. Garlotte's initial parole eligibility comes  
25 around in March 1996, he will still have the balance of

1 his life terms to serve as well as a parole term on the  
2 marijuana conviction. This is not idle imagination,  
3 either.

4 One of the cases we cite, Williams v. Puckett,  
5 describes a situation where a prisoner who was on  
6 probation committed a subsequent offense, was sentenced  
7 upon that offense, and had his probation revoked.

8 The order in which the Department of Corrections  
9 considered those sentences satisfied was first the  
10 mandatory term on the revoked probation, second, the  
11 minimum parole term on -- actually, it was a nonparolable  
12 offense, armed robbery, that entire 10-year term next, and  
13 finally the parole term on the original offense, so  
14 it's -- they really are discharged in dovetail fashion.

15 Then also, in response to Justice Breyer's  
16 question, which is an intriguing one, I think this case,  
17 of course, illustrates the direct restraint that is posed  
18 by Garlotte's marijuana conviction, but I think even  
19 beyond the date of initial parole eligibility, like in the  
20 year 15 or 20, the sentences still are treated as a  
21 general sentence.

22 The earned time that he has on his marijuana  
23 conviction is carried forward and can be forfeited at any  
24 point, and if the marijuana conviction is invalidated, he  
25 can get credit for that service on his life sentences,

1 even at that point.

2 If there are no further questions, thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Boyle.

4 The case is submitted.

5 (Whereupon, at 12:01 p.m., the case in the  
6 above-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:*

HARVEY F. GARLOTTE, Petitioner v. KIRK FORDICE,  
GOVERNOR OF MISSISSIPPI

CASE NO.: 94-6790

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

BY Ann Marie Federico

(REPORTER)