

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LEROY L. YOUNG, ET AL., Petitioners v.
ERNEST EUGENE HARPER

CASE NO: No. 95-1598

PLACE: Washington, D.C.

DATE: Monday, December 9, 1996

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LEROY L. YOUNG, ET AL., :
4 Petitioners :
5 v. : No. 95-1598
6 ERNEST EUGENE HARPER :
7 - - - - -X

8 Washington, D.C.

9 Monday, December 9, 1996

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

13 APPEARANCES:

14 SANDRA D. HOWARD, ESQ., Assistant Attorney General of
15 Oklahoma, Oklahoma City, Oklahoma; on behalf of the
16 Petitioners.

17 MARGARET WINTER, ESQ., Washington, D.C.; on behalf of the
18 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 95-1598, Leroy Young v. Ernest Eugene
5 Harper.

6 Ms. Howard.

7 ORAL ARGUMENT OF SANDRA D. HOWARD

8 ON BEHALF OF THE PETITIONERS

9 MS. HOWARD: Mr. Chief Justice, and may it
10 please the Court:

11 During the past decade, Oklahoma, like many
12 other States, has experienced a serious prison
13 overcrowding problem. In an attempt to deal with this
14 crisis, and at the same time to meet the goals of
15 incarceration, the Oklahoma legislature has had to come up
16 with some innovative programs. One such program is the
17 program at issue here today, the pre-parole conditional
18 supervision program.

19 Ernest Harper was placed on this program after
20 serving 14 years of a life sentence for first degree
21 murder. He was reclassified to a higher security level
22 when the Governor of Oklahoma denied his parole.

23 The Tenth Circuit found that because Mr. Harper
24 had been serving his sentence outside the physical
25 boundaries of a prison, that his program was like parole,

1 and that he was entitled to the full protections of a
2 Morrissey v. Brewer hearing before reclassification.

3 We believe the Tenth Circuit erred in one major
4 reason. The Tenth Circuit failed to consider the true
5 nature of the program. The Tenth Circuit's approach to
6 the program was really very simple. The Tenth Circuit
7 found that because this was a program in which a prisoner
8 was serving his sentence outside the four walls of the
9 prison, that it was like parole. It is really very
10 different from parole in several respects.

11 First, I think what we need to do is look at the
12 nature of the program. You told us that in Sandin, and
13 you had told us that previously in Meachum v. Fano and
14 other cases, and when we look at the nature of the
15 program, we have to consider several things.

16 First, we have to consider the purpose for which
17 the program was instituted. We have to consider the
18 function of the program, how it operates within the State,
19 and this program, unlike parole, does not function as a
20 program to reintegrate people into society. It functions
21 as a program to alleviate prison overcrowding.

22 QUESTION: Ms. Howard, did the State have any
23 procedures in effect at the time this case arose for a
24 situation like this where one group permitted the pre-
25 parole but then the Governor subsequently denied parole?

1 Were there any written procedures in place for that
2 situation --

3 MS. HOWARD: There --

4 QUESTION: -- when this case occurred?

5 MS. HOWARD: There were some written procedures
6 at that time. They did not deal specifically for
7 reclassifying somebody in the particular situation that
8 Mr. Harper was in.

9 QUESTION: So the answer is there wasn't
10 anything that covered this case.

11 MS. HOWARD: Nothing specific.

12 QUESTION: And subsequently the State has
13 adopted some procedures?

14 MS. HOWARD: Several procedures have been
15 adopted by our Pardon and Parole Board since that time,
16 and in 1991, after the time Mr. Harper was already brought
17 back onto the program, our Pardon and Parole Board adopted
18 a policy where they now leave people out for 90 days
19 before reexamining them and determining whether to
20 bring --

21 QUESTION: And then it's discretionary with the
22 board whether to terminate it, the pre-parole, simply
23 because the Governor had denied parole?

24 MS. HOWARD: Actually, it's a determination made
25 by our Department of Corrections, which is somewhat

1 confusing in this case.

2 The Pardon and Parole Board recommends people
3 for pre-parole to our Department of Corrections, and the
4 Department of Corrections makes the ultimate decision
5 about --

6 QUESTION: And on what basis do they now make
7 that decision? Is it just totally discretionary --

8 MS. HOWARD: Yes, it's --

9 QUESTION: -- with the Department, or do they
10 consider how the prisoner has behaved on pre-parole?

11 MS. HOWARD: It is totally discretionary with
12 the Department, and they derive their authority from this
13 Court's opinion in Meachum v. Fano.

14 QUESTION: Well, can they flip a coin?

15 MS. HOWARD: Yes, they can.

16 QUESTION: Under Oklahoma law you would advise
17 the board that they can flip a coin?

18 MS. HOWARD: I would advise that that would be
19 permissible in this situation.

20 QUESTION: So there -- you then take it that the
21 claim before us today doesn't carry a substantive
22 component to it?

23 MS. HOWARD: No.

24 QUESTION: That you go through the motions of a
25 hearing, but then they can flip a coin.

1 MS. HOWARD: I'm not --

2 QUESTION: And that gives them due process.

3 MS. HOWARD: Right. I'm not --

4 QUESTION: Is that right?

5 MS. HOWARD: Well, I'm not discounting any type
6 of claim, a First Amendment violation or an Eighth
7 Amendment violation, if there were an independent
8 constitutional violation. We're not saying that they can
9 revoke on the basis of exercising their First Amendment
10 or, you know, on the basis of race, but other than that,
11 other than some independent constitutional violation --

12 QUESTION: Well, flipping a --

13 QUESTION: But what was it in the regulations or
14 the statute at the time that this took place that said
15 that pre-parole can be revoked upon the Governor's
16 refusing a pardon?

17 MS. HOWARD: Again, there's nothing specific in
18 the statute. What we do have, we have a statute which
19 implements the program, and it indicates that people on
20 that program are inmates within the Department of
21 Corrections.

22 It indicates that they are subject to escape
23 charges if they don't report back from the program. It
24 indicates also that they're subject to the disciplinary
25 proceedings of the Department of Corrections. From that

1 we assume, or we know, that this is a type of
2 classification within the Department of Corrections under
3 Meachum v. Fano.

4 QUESTION: But Mr. Harper was asked at the time
5 he was put in this program, he was asked to sign a form,
6 and I'm looking at page 5 of the joint appendix.

7 MS. HOWARD: Yes.

8 QUESTION: And that form says, reviewed options
9 available in the event of parole denial, and he signs it,
10 and I guess somebody from the Department of Corrections
11 signs it. Well, what were those options that were
12 reviewed with him that would be available in the event of
13 parole denial?

14 MS. HOWARD: At the end, we don't have anything
15 specific in our regulations saying what those options
16 were. I'm told by the Department of Corrections that at
17 that time it was automatic, that if the Governor denied
18 parole they automatically reclassified --

19 QUESTION: So this was a misrepresentation on
20 the form that they asked him to sign? It said options?

21 MS. HOWARD: Well, we don't know for sure if
22 those options are only limited to -- to two options of
23 either being brought back in or being stayed out. It
24 could be other options that are not directly related to
25 the specific decision about whether to reclassify or not,

1 you know, so --

2 QUESTION: Well, was staying out, as you put it,
3 one of the options?

4 MS. HOWARD: At that time it was not. It is
5 now. At that time it was not.

6 QUESTION: In fact, as I understand it, some of
7 these individuals who were denied parole were brought back
8 like this particular prisoner, and some were not, is that
9 correct?

10 MS. HOWARD: At the time --

11 QUESTION: Not all of them have been brought
12 back.

13 MS. HOWARD: At the time that Mr. Harper was
14 brought back, everyone in his similar situation was
15 brought back in.

16 QUESTION: But that's not the case now?

17 MS. HOWARD: That is not the case now.

18 QUESTION: Well --

19 QUESTION: You mean there were no options, then?

20 MS. HOWARD: Well, there were no options as far
21 as, if you consider the options stay out or come in.

22 QUESTION: What other options would there be?

23 MS. HOWARD: Well, like you, I'm somewhat
24 troubled by that language, that I think perhaps it could
25 refer to other types of options once he's back within the

1 prison. You know, whether -- which institution he's going
2 to be placed at, whether he's going to be at a minimum
3 security in the southern part of the State or in the
4 northern part of the State. You know, other types of
5 restrictions that may be placed on him.

6 QUESTION: Your --

7 QUESTION: What is the change in the law between
8 the time he was brought back and the present that explains
9 why some of the prisoners are not being brought back
10 today, whereas he was?

11 MS. HOWARD: Do you mean, what is the rationale
12 behind the change, or --

13 QUESTION: Well, has there been any change in
14 the State statute?

15 MS. HOWARD: There has been no change in the
16 State statute with regard to that. There's been one
17 slight change in the statute which deals with educational
18 programs that --

19 QUESTION: But that doesn't cover this.

20 MS. HOWARD: Right. There --

21 QUESTION: What does explain as a matter of law,
22 if anything, the difference in treatment?

23 MS. HOWARD: I don't know that there's anything
24 as a matter of law.

25 QUESTION: So it's a matter of administrative

1 practice?

2 MS. HOWARD: It's a matter of administrative
3 policy, which is really my point here, the point we're
4 trying to make in this case.

5 QUESTION: Well, before you go on to that, how
6 is the decision being made today as to whether he -- a
7 given prisoner will be brought back or not? I mean, I
8 assume they're not flipping coins.

9 MS. HOWARD: No.

10 QUESTION: But how are they making this
11 decision?

12 MS. HOWARD: A review board in the Department of
13 Corrections is making the decision.

14 QUESTION: And what is it grounding its decision
15 on? What does it consider?

16 MS. HOWARD: Again, there are no specific
17 statutory or regulatory guidelines, but they --

18 QUESTION: Well --

19 MS. HOWARD: One --

20 QUESTION: If it's not flipping a coin, wouldn't
21 a hearing with an opportunity to appear and give reasons
22 why one should be brought back or not brought back
23 function as a normal due process hearing would function?

24 MS. HOWARD: It might would function as that,
25 but I think the question here is whether there's a liberty

1 interest in this program such that he's required to have a
2 hearing, and --

3 QUESTION: But in any case, leaving the liberty
4 interest issue aside, there would be the same function for
5 this hearing that there would be, I presume, for a parole
6 revocation hearing. There would be an opportunity to
7 argue that one should not be brought back, for whatever
8 equitable reasons one could raise. That's fair to say, is
9 it?

10 MS. HOWARD: There would be an argument -- there
11 would be -- under Meachum v. Fano I keep coming back to,
12 but that case discussed the fact that when you're dealing
13 with classification systems like this one is, that there's
14 no -- that there's no right to participate in the decision
15 of whether or not to reclassify. It's purely --

16 QUESTION: Well, but this is a question which
17 involves not only a reclassification, but a revocation of
18 liberty, and Morrissey and Brewer says expressly, whatever
19 you call it, by whatever name, the liberty in fact is an
20 interest which deserves a hearing before it is revoked, so
21 I don't see why you don't fall within the terms of
22 Morrissey, because you have a) liberty in fact, and b) a
23 discretionary decision about whether to revoke it or not.

24 MS. HOWARD: I think we have to look at the
25 Morrissey v. Brewer opinion closely to determine whether

1 we do really fall under Morrissey, and there are
2 several --

3 QUESTION: Well, you fall within the language
4 that I just referred to. You would agree with that,
5 wouldn't you?

6 MS. HOWARD: I would agree with that, but I
7 think we also -- and the Court talks about this in
8 Morrissey, is you have to look at the function of the
9 program.

10 QUESTION: Well, yes. I suppose also Morrissey
11 v. Brewer may have decided this -- described kind of a
12 generic parole. It didn't purport to account for all the
13 different variations in the different States, and I gather
14 what your State is saying is that the Oklahoma system, at
15 least now and perhaps as it was when this respondent was
16 dealt with by it, was different from the ordinary system.

17 MS. HOWARD: That's exactly the point I wanted
18 to make, Your Honor, that when Morrissey talked about
19 parole, Morrissey talked about the fact that parole had
20 been around for 60 years, it was a well-established part
21 of the penal system, and that --

22 QUESTION: Well, suppose we decided here, at
23 least a majority were to conclude that it is most closely
24 analogous to parole, and therefore Morrissey is some --
25 it's applicable in some respect, do you think the system

1 the State now has in place would suffice if the ultimate
2 decision is arbitrarily decided?

3 MS. HOWARD: The system they now -- the State
4 now has in place still does not entitle the inmate to a
5 hearing, so, you know, if this Court were to find that a
6 Morrissey --

7 QUESTION: The new system does not --

8 MS. HOWARD: No.

9 QUESTION: -- give the inmate a hearing?

10 MS. HOWARD: No, it does not. It allows the
11 inmate to stay out for a certain time before the
12 Department of Corrections makes a decision to bring him
13 back in, but the new system does not entitle him to a
14 hearing.

15 QUESTION: And if this Court thought that
16 Morrissey were applicable, do you defend that system?

17 MS. HOWARD: If this Court thought --

18 QUESTION: If we thought that it was analogous
19 to parole.

20 MS. HOWARD: If you thought that it was like
21 parole such that Morrissey applied, then I think we would
22 have a hard time defending that system.

23 QUESTION: Well, you can't under our due proces
24 cases say that we have a particular scheme here, and it
25 doesn't call for a hearing, and therefore that's the end

1 of it. I mean, if the scheme calls for a determination of
2 facts before a particular action can be taken, then due
3 process may be implicated even though there's no provision
4 for a hearing in the State system.

5 MS. HOWARD: I would agree with that, that first
6 you have to find a liberty interest.

7 QUESTION: May I ask you, you said this is
8 different from parole, and you never quite explained why.
9 Would you tell me, from the standpoint of the person out
10 of jail, what's the difference?

11 MS. HOWARD: I will answer that question and
12 then I'd like to also make a couple of other comments.

13 From the standpoint of someone out of jail, like
14 Mr. Harper --

15 QUESTION: Right.

16 MS. HOWARD: -- there are several differences.

17 One, Mr. Harper is still bound by the prison
18 disciplinary proceedings, so if he commits some sort of
19 disciplinary violation while he's out on pre-parole, just
20 something that would be a disciplinary misconduct in the
21 prison, like a disrespect to his supervising parole
22 officers, then he can be charged with a disciplinary
23 violation and earned credits can be taken away.

24 QUESTION: And you don't think that Morrissey,
25 if he was disrespectful to his parole officer, could have

1 been disciplined?

2 MS. HOWARD: There's no provision for that.

3 QUESTION: I see.

4 MS. HOWARD: Under parole, you're either revoked
5 or you're -- there are no provisions --

6 QUESTION: I see. In other words, there's
7 discipline short of revocation.

8 MS. HOWARD: Exactly.

9 QUESTION: Okay.

10 MS. HOWARD: Another important -- I think a real
11 important point to make is that prisoners on this pre-
12 parole conditional supervision program are earning earned
13 credits within our Department of Corrections. Some States
14 call them good time credits. We have a system where
15 you're placed on a certain level, and you may earn an
16 additional 44 days or 33 days or 22 days based on things
17 like the management of your living space and hygiene,
18 participation in an education program, or a job --

19 QUESTION: These are good time credits
20 shortening the release date?

21 MS. HOWARD: Right.

22 QUESTION: Well, can't a person on parole earn
23 those, too?

24 MS. HOWARD: No. People on parole do not earn
25 those. Again --

1 QUESTION: I would take it -- correct me if I'm
2 wrong -- that a parolee is subject to a certain amount of
3 increased restrictions if he seems to be not quite
4 adjusting to the instructions of the parole. He'd say,
5 you have to report to me three times a week, instead of
6 once a week. You must be home at night. You can't go out
7 at night. So there are, it seems to me, all sorts of
8 options that the parole officer has, short of revocation.

9 MS. HOWARD: There may be additional options,
10 depending upon --

11 QUESTION: So then that distinction between your
12 pre-parolee respondent here and the parolee in the
13 standard parole case doesn't seem to hold up in your
14 answer to Justice Stevens.

15 MS. HOWARD: Well, the distinction, I believe,
16 is the fact that these -- the things that I were
17 mentioning to Justice Stevens show that this inmate,
18 people on pre-parole are continuing to serve their
19 sentence under the Department of Corrections.

20 With a parole program, yes, the parole officer
21 could put additional burdens on a parolee if it was in --
22 if it was within the rules and conditions which were
23 originally imposed upon him. They couldn't go outside
24 those rules and conditions, but if they were within those
25 rules and conditions they could put additional burdens on

1 him, but not the type of burdens that would be given to an
2 inmate in a prison, which is what people on pre-parole
3 have.

4 QUESTION: Ms. Howard, who administers the pre-
5 parole program. Is it administered by the prison warden?

6 MS. HOWARD: It's administered by our Department
7 of Corrections.

8 QUESTION: Or -- and who administers parole? Is
9 it a separate organization?

10 MS. HOWARD: It's -- the Pardon and Parole Board
11 recommends people for parole, and they ultimately do
12 administer that --

13 QUESTION: No, but once they go out on parole, I
14 mean, who takes care of seeing that everybody's abiding by
15 his parole restrictions and so forth?

16 MS. HOWARD: Parole officers would report that
17 to the Pardon and Parole Board.

18 QUESTION: Okay, so the Pardon and Parole Board,
19 which is independent of the Bureau of Corrections?

20 MS. HOWARD: Yes. There are some overlaps, and
21 like in this situation, people on pre-parole, they're
22 supervised by parole officers, and they're employees of
23 the Department of Corrections, so there's some overlap
24 between the two departments.

25 QUESTION: So the supervisor while he's at

1 liberty would be the same whether he's on parole or pre-
2 parole?

3 MS. HOWARD: The specific employee might be the
4 same. They're both parole officers. But that's just an
5 ease of function with our Department of Corrections, is
6 that they use these parole officers for performing these
7 functions, but they still report to the Department of
8 Corrections as opposed to the Pardon and Parole --

9 QUESTION: But the judgment whether to bring him
10 back, for example, or whether to impose some kind of a
11 sanction, whether it's more frequent consultation with a
12 parole officer or denial of good time credits or whatever
13 else, that judgment is made by the warden or by the
14 Department of Corrections?

15 MS. HOWARD: The Department of Corrections, yes,
16 Your Honor.

17 QUESTION: Not by the parole board?

18 MS. HOWARD: No. All they do is recommend
19 people for placement on the program.

20 QUESTION: I still am not quite clear on the
21 reasons that this respondent could have been brought back
22 at the -- under the regulations then in force.

23 At page 18 and 19 of your brief, 19 -- the
24 bottom of page 18, you said, an inmate on the program is
25 aware that he may be reclassified to a higher security

1 level -- I assume that means being brought back into the
2 facility -- for any reason, including that the Governor
3 denied the inmate for parole, that he no longer meets
4 eligibility requirements, whether he violated a rule.

5 It seems to me that that means that there must
6 be some reason given. If you said for any reason at all,
7 including flipping a coin, you wouldn't need those
8 three -- those three classifications.

9 MS. HOWARD: That gets us to the point that this
10 Court recently made in Sandin, which is that you don't
11 look at language like that and pick it apart in a
12 mechanical manner. You look to the nature of the program,
13 and here, yes, there is some language saying you will be
14 removed or you may be removed if you don't abide with the
15 educational rules --

16 QUESTION: It says two things, you may be
17 removed, which indicates there's some discretion, for a
18 reason.

19 MS. HOWARD: But that doesn't leave an
20 implication that you may not be removed for any other
21 reason, and that's exactly what this Court was talking
22 about most recently in --

23 QUESTION: Well then, I don't know why you
24 described the program in that way.

25 MS. HOWARD: In -- I'm sorry.

1 QUESTION: It seems to me your description is
2 completely unnecessary if no reason at all is necessary to
3 be given.

4 MS. HOWARD: We're describing the program as a
5 reclassification system. When the inmate goes on the
6 program, he signs the forms, the orientation that he
7 signed -- joint appendix page 4, specifically on page 6.
8 The inmate knew that he was being classified at a
9 community level. That is a type of classification.

10 QUESTION: I don't have the joint appendix
11 before me, Ms. Howard, but what exactly -- you say the
12 inmate was aware he can be reclassified to be in fact
13 brought back for several -- including the Governor has
14 denied the inmate parole.

15 Now, what exactly does that section you're
16 referring to say about being brought back if the
17 Government -- if the Governor denies parole?

18 MS. HOWARD: Again, I would admit to you there's
19 no specific language I can point to that says --

20 QUESTION: Well, is there general language you
21 can point to?

22 MS. HOWARD: General language that he's on a
23 community level. General language that this case fits
24 within Meachum v. Fano, which deals with --

25 QUESTION: Yes, but now, that's drawing a legal

1 conclusion, but I'm curious to know just what's there.

2 MS. HOWARD: We also have a statute, title 57,
3 section 512, which says that the prison officials may
4 transfer between institutions.

5 QUESTION: So the prison officials in effect
6 regarded this as just another form of confinement.

7 MS. HOWARD: Exactly.

8 QUESTION: Except it wasn't in the prison.

9 MS. HOWARD: Well, it -- the restrictions that
10 were placed on the inmate were such that it is a type of
11 confinement.

12 With parole, as I was saying earlier, parole is
13 an established part of the penal system. The purpose of
14 it, everyone knew in *Morrissey v. Brewer* that the purpose
15 of parole was to reintegrate people into society.

16 Here, this program is implemented for
17 overcrowding. It was implemented not because it was a
18 integral part of any penalogical system, but implemented
19 for a specific purpose.

20 QUESTION: Well, what restrictions were placed
21 on him that were different from restrictions placed on
22 parolees?

23 MS. HOWARD: As I was mentioning earlier, if he
24 escapes, then he's subject to escape charges, criminal
25 charges for escape. That's different than a parolee.

1 He's subject to the disciplinary proceedings of the
2 Department of Corrections -- different from a parolee.

3 If he needs medical treatment and wishes to have
4 it paid for, he may -- he can go back into an institution
5 and have that medical treatment. That's different from a
6 parolee. Also, earning the credits and getting not only
7 the time that he's out serving his sentence but also
8 additional time for credits.

9 With parole, in Oklahoma a parolee gets credit
10 for time that he's out on parole credited towards his
11 sentence, his flat time. That, if a parolee's sentence is
12 revoked and he's brought back in, he may or may not get
13 credit for that time that he's been out serving, so if a
14 parolee, say, has a 10-year sentence and after 8 he's out,
15 and he has a 2-year suspended sentence --

16 QUESTION: May I ask a pretty -- maybe it's the
17 same question the Chief Justice asked in another way.
18 There are a lot of reasons for it, and a lot of -- if he
19 does something wrong, different things can happen to him
20 from the parolee.

21 But supposing he just works and earns his money
22 and pays his rent and does everything else, and reports to
23 whoever it is he has to report to, is -- does he, in his
24 normal daily life, if he behaves himself completely, is
25 there any difference in his life and that of a parolee?

1 MS. HOWARD: If you're talking about day-to-day
2 functions like, you know, visiting with his family and,
3 you know, going on about --

4 QUESTION: And going to work, and going to the
5 movies, or whatever it is.

6 MS. HOWARD: Then I can't think of anything
7 specific in a day-to-day --

8 QUESTION: I thought he couldn't leave the
9 State. Isn't he --

10 MS. HOWARD: He -- the medical -- I wanted to
11 make a point about if he needs medical treatment he has to
12 go back in for it. He can't leave the State --

13 QUESTION: What about -- what if the parolee --
14 couldn't a parolee go back in for medical treatment?

15 MS. HOWARD: Not unless his parole were revoked.
16 I mean, the Department --

17 QUESTION: He could not -- oh, not unless his
18 parole is revoked.

19 MS. HOWARD: Yes. If he wants to be willing to
20 have his parole revoked I suppose he could, and --

21 QUESTION: Can he leave the State, the parolee?

22 MS. HOWARD: He cannot leave the State.

23 QUESTION: So he's better off than the parolee.

24 QUESTION: A parolee cannot leave --

25 MS. HOWARD: A parolee can leave the State with

1 permission. Someone on the pre-parole program cannot even
2 leave the State with permission. They can only leave the
3 county with permission. So there are several ways --

4 QUESTION: But on the medical point you made, I
5 think you're saying that the person on pre-parole is
6 better off than the parolee, right, because he has an
7 option the parolee doesn't have.

8 MS. HOWARD: There are certain things about the
9 program, if you just look at one isolated portion like
10 that, that make it appear to be better, but overall, when
11 you look at the true nature of the program --

12 QUESTION: Because he wouldn't -- if he could
13 pay for the doctor himself, he could go to his own doctor,
14 just like the parolee could.

15 MS. HOWARD: Right.

16 QUESTION: Well, of course, in that sense all of
17 the people still in prison are better off than the
18 parolee.

19 (Laughter.)

20 MS. HOWARD: Exactly. Better off than many of
21 us on some occasions.

22 QUESTION: Well, he is confined to the county,
23 and the parolee is confined to the State.

24 MS. HOWARD: A parolee is technically released
25 from his sentence of imprisonment. His sentence is

1 suspended while he's on parole, and a person on the pre-
2 parole program is continuing to serve his sentence.

3 QUESTION: Yes. You want to answer my question?

4 MS. HOWARD: I'm sorry.

5 QUESTION: The parolee is confined to the State,
6 is that right?

7 MS. HOWARD: I don't know that he's --

8 QUESTION: Unless he gets permission.

9 MS. HOWARD: -- that he's -- oh, physically
10 confined to the State.

11 QUESTION: Yes.

12 MS. HOWARD: I'm sorry, I misunderstood your
13 question.

14 QUESTION: Yes. Yes.

15 MS. HOWARD: Yes, he is.

16 QUESTION: And the pre-parolee is confined to
17 the county.

18 MS. HOWARD: Right.

19 QUESTION: That's a pretty big difference, I
20 suppose.

21 QUESTION: How many people in your estimation --
22 no, how long in your estimation do people spend on pre-
23 parole release?

24 MS. HOWARD: Well, because of the nature of the
25 program, I'd say about a year generally, if they continue

1 on the program, because pre-parole is considered a year
2 earlier than parole is considered.

3 QUESTION: Are there people who were released
4 for a year before their consideration of parole, and then
5 parole was denied, who have remained out?

6 MS. HOWARD: There may be people like that now.
7 There were no people at the time Mr. Harper was brought
8 back in, but now there may be such people, yes.

9 QUESTION: And how many people would you say
10 approximately are on this program?

11 MS. HOWARD: About -- at this time I would say
12 about 1,200 or so are probably on the program. Again,
13 there's nothing specific in the record dealing with that.

14 QUESTION: Does the parole board consider
15 different factors in determining whether a particular
16 prisoner should get pre-parole, such as whether he will be
17 a threat if put on pre-parole to society, and his chances
18 of meeting the requirements and so forth? Do they
19 consider that?

20 MS. HOWARD: Again, I hate to keep saying this,
21 but there's nothing in our statute which sets forth what
22 considerations the parole board should make.

23 QUESTION: Is there anything in the statute
24 about what they consider for parole?

25 MS. HOWARD: Certain people are --

1 QUESTION: Anything in the statute?

2 MS. HOWARD: Not specifically, no.

3 QUESTION: And do we have any reason to know
4 whether they consider the same or different factors?

5 MS. HOWARD: I think one reason that we would
6 know that is that with pre-parole we look at the purpose
7 of the program, which is to alleviate overcrowding.

8 QUESTION: So even if it's a triple ax murderer,
9 you'd automatically give them pre-parole?

10 MS. HOWARD: Not automatically, but they may be
11 given pre-parole --

12 QUESTION: They wouldn't consider, you think,
13 whether they're going to be a threat on release?

14 MS. HOWARD: They certainly may consider that,
15 and -- but I -- but they are not required to consider
16 that.

17 QUESTION: May I ask another question along
18 Justice O'Connor's line?

19 Supposing the prison is extremely crowded. Is
20 it permissible for the parole board to take that fact into
21 consideration in deciding whether to grant someone parole
22 that might not -- could be right on the margin?

23 MS. HOWARD: It might be permissible, but there
24 are no specific guidelines for when --

25 QUESTION: So overcrowding could play a role in

1 either decision.

2 MS. HOWARD: It possibly could, but --

3 QUESTION: Yes.

4 MS. HOWARD: -- with this program --

5 QUESTION: It specifically is a response to
6 overcrowding. I understand.

7 MS. HOWARD: -- it was the focus of the program.

8 QUESTION: Yes.

9 MS. HOWARD: And in doing that, they might have
10 to consider who best to let out. If they know they're
11 going to let out a certain number of people, then they
12 might let out the people who are less of a danger to
13 society, but that doesn't mean that --

14 QUESTION: If everybody else is a quadruple ax
15 murderer, they would presumably let out the triple ax
16 murderer, right?

17 MS. HOWARD: Right.

18 QUESTION: But would they do the same --

19 MS. HOWARD: Or the double murderer such as Mr.
20 Harper.

21 QUESTION: But would they do the same thing in
22 bringing people back? That is, suppose they now get some
23 extra cells free, do they now bring people back because
24 they say, we don't need all these people out there any
25 more. We have some extra cells, and there are a few

1 people who have done worse things than others, and we're
2 going to bring them back.

3 MS. HOWARD: I'm not aware of any situations
4 where they've done that, because to this point we've never
5 had any extra cells, but I think pursuant to our program
6 we could, if the Department of Corrections chose to do
7 that. When it got to the point to where the prison was no
8 longer crowded, they --

9 QUESTION: But I thought that under the program
10 currently someone is kept in the program even if they're
11 denied parole until there's a 90-day period when they
12 decide what will be done with the person.

13 MS. HOWARD: They may be left out for 90 days
14 and then still a determination is made whether to bring
15 them back or not, but they're still not entitled to a
16 hearing at that --

17 QUESTION: In terms of what is told to a person
18 who is entering such a program, we've already established
19 that we don't know what options there were, but he was
20 also asked, Harper was asked to sign another thing, and
21 this is on page 9 of the joint appendix.

22 He signed saying, I understand that waiving
23 parole, waiving parole while on pre-parole status will
24 result in reclassification to a higher security status.
25 What does that mean, waiving parole?

1 MS. HOWARD: Refusing to be considered, or
2 deciding not to be considered for parole.

3 QUESTION: He would -- why a -- would someone
4 decide that they don't want to be considered for parole?

5 MS. HOWARD: It gets back to the point that
6 Justice Stevens was making earlier, that there are some
7 situations where pre-parole is more advantageous, and
8 because a defendant is earning credits while he's out on
9 pre-parole, in addition to flat time served, he may get
10 out earlier on pre-parole --

11 QUESTION: But this says that if he does that --
12 if he waives parole, this says, while he's on pre-parole
13 status, back he goes. It will result in reclassification.

14 MS. HOWARD: That's to prevent the situation, as
15 an inmate, trying to manipulate the system that way,
16 staying out on pre-parole rather than being placed on
17 parole, where society would have their interests filled by
18 having him in a program where he's being rehabilitated
19 into society.

20 QUESTION: So this is telling him, you must be
21 considered for parole when your time comes up, otherwise
22 you go right back.

23 MS. HOWARD: Exactly.

24 One point I want to make, too, is that the
25 inmate's understanding of what he will and won't get from

1 the program is not the critical factor here. This Court
2 discussed that in Sandin. This Court discussed it in
3 Connecticut v. Dumschat. The Court also discussed that in
4 Jago, J-a-g-o-, v. Van Kirrin.

5 In Jago, they had told an inmate that he would
6 get out on parole, and then later the Department of
7 Corrections determined that no, they wouldn't let him out,
8 and the Court said that even though there was a mutually
9 explicit understanding that he would get out, that that
10 did not give him a liberty interest in the program. The
11 same thing with the Connecticut v. Dumschat case.

12 Also, as my time runs down I want to make the
13 point that the purpose of this program is a prison
14 administrative program. It's to deal with problems that
15 are inherent in the prison, and this Court was very
16 specific in Sandin that Federal courts should stay out of
17 the day-to-day management of prisons. We need to be able
18 to have as much opportunity as we can with this programs
19 in order to experiment and try different things.

20 You know, we used to -- we brought people back
21 in automatically if parole was denied. Now we leave them
22 out 90 days, or maybe even a longer period of time. That
23 is a function of the program, and the prison
24 administrators are the proper ones to make that
25 determination on what do we need to do with these type of

1 programs.

2 I'd like to reserve my remaining time -- which I
3 don't have.

4 QUESTION: Which you don't have.

5 (Laughter.)

6 QUESTION: Thank you --

7 MS. HOWARD: Thank you.

8 QUESTION: -- Ms. Howard.

9 Ms. Winter, we'll hear from you.

10 ORAL ARGUMENT OF MARGARET WINTER

11 ON BEHALF OF THE RESPONDENT

12 MISS WINTER: Mr. Chief Justice, and may it
13 please the Court:

14 In Morrissey v. Brewer the Court examined the
15 nature of a parolee's interest in his continued liberty.
16 The Court defined parole as follows: the essence of
17 parole is release from prison before completion of
18 sentence on condition that the prisoner abide by certain
19 rules during the balance of the sentence.

20 The Court decided that even though the parolee's
21 liberty is only partial and conditional, nevertheless it
22 includes many of the core values of unconditional liberty.

23 QUESTION: Do you think the Morrissey opinion
24 was entitled -- was intended to apply to every single
25 program that a State might set up under the name of

1 parole, no matter what the conditions of it were?

2 MISS WINTER: No.

3 QUESTION: Then you really have to examine the
4 Oklahoma program, don't you --

5 MISS WINTER: Yes.

6 QUESTION: -- to see what would be Morrissey's
7 impact on it in terms of a duty process hearing?

8 MISS WINTER: Yes, I agree, and what we are
9 really saying is, is that in the State of Oklahoma they
10 have created two programs, two parole programs, both of
11 which fall well within the parameters discussed in
12 Morrissey. One of these programs they all parole, and the
13 newer program they call the pre-parole conditional
14 supervision program.

15 The eligibility requirements are identical for
16 the two programs, with the exception that a prisoner can
17 qualify a little bit earlier for pre-parole than for
18 parole, and the --

19 QUESTION: Do you agree with counsel for the
20 State that pre-parole can be revoked for any reason or no
21 reason at all -- that pre-parole can be revoked, that the
22 respondent can be told to report to Correction for any
23 reason or no reason at all? Do you agree with that?

24 MISS WINTER: No. I'm not sure I'm
25 understanding the question. We --

1 QUESTION: I tried to find out from opposing
2 counsel, the counsel for the State of Oklahoma, the
3 grounds upon which pre-parole could be revoked, and I
4 thought the answer was any reason at all. You can flip a
5 coin. The corrections board can say, I'm bored. We're
6 not going to -- we'll just revoke all these people. We
7 don't want to read all these papers.

8 Do you agree that that is the proper description
9 of the duties of the corrections board under this program,
10 that they can revoke for no reason at all?

11 MISS WINTER: That statute doesn't say. That's
12 the way the State is interpreting it, and --

13 QUESTION: Do you agree with that
14 interpretation?

15 MISS WINTER: I don't know exactly what Your
16 Honor is asking. It seems to me that under the
17 regulations they say that they are making a decision. If
18 they're making a decision, that has certain due process
19 implications.

20 QUESTION: Well -- well, apart from due process,
21 under State law, are there any principles that guide the
22 Board of Corrections in determining to revoke pre-parole
23 status?

24 MISS WINTER: In -- this case was heard in State
25 court. There was never any -- that issue never came up,

1 because this is a very new claim of the State, that they
2 can revoke for any reason or no reason in State --

3 QUESTION: Well, would you agree -- would you
4 agree that the Board of Corrections can give no reason at
5 all, say, well, we're -- I'm bored today. I don't want to
6 read these papers. I'm just going to revoke all the
7 parole. I'm not going to go through this paperwork.
8 Could he do that, the corrections officer?

9 MISS WINTER: Well, we're here to see that he
10 can't do that. I don't --

11 QUESTION: I'm talking about under State law.

12 MISS WINTER: There is -- the statute doesn't
13 speak to this. The regulations don't say, it can be
14 revoked for any reason or no reason. The regulations --
15 the only existing regulations that have ever been
16 promulgated in the State, either by the Department of
17 Corrections or by the Pardon and Parole Board, would
18 suggest the opposite.

19 QUESTION: I think they would suggest the
20 opposite, and I think the form that is set forth at pages
21 4, 5, and 6 of the joint appendix indicates that he has a
22 certain expectation -- that's the word the form used --
23 that he is expected to be in compliance with all of these
24 rules, which would indicate to me that under the State's
25 procedure, discretion has certain boundaries.

1 MISS WINTER: Under the form that Mr. Harper
2 signed, the time -- the form that was used at the time he
3 was let out, the last thing he's expected to sign off on
4 after having been given all the rules and procedures is a
5 statement, I understand that my being released into the
6 community is dependent upon my compliance with all of
7 these expectations, and so it seems to me clear that at
8 the time that he was released, at least the Department of
9 Corrections and the parole board understood that they
10 couldn't do it for any reason or no reason.

11 QUESTION: Oh, I -- it doesn't mean that. It
12 just means if you don't live up to the expectations you
13 will be pulled back. It doesn't mean you can't be for
14 other reasons, necessarily.

15 MISS WINTER: Well, you see --

16 QUESTION: But you're sort of compelled to
17 argue, aren't you -- don't you really have to answer yes
18 to the question Justice Kennedy was asking?

19 If -- if this could be revoked for any reason
20 whatever, what good would a hearing be? I mean, you
21 usually don't have a -- you usually have a hearing to find
22 out whether a particular legal requirement was complied
23 with or not. If there's no legal requirement, what
24 possible good is the hearing?

25 MISS WINTER: It seems to me that what the --

1 QUESTION: I mean, your client comes in and
2 says, you know, you pulled me back, and -- yes, we did.
3 Why? He says, oh, because we felt like it. A hearing
4 would be utterly useless, wouldn't it?

5 MISS WINTER: It certainly would be useless.
6 There would be no point at all if they could bring them
7 back, if under the Constitution they could bring them back
8 for any reason or no reason.

9 QUESTION: All right, so why on that very
10 point -- I -- there's a State court finding here that the
11 reason that your client was removed from the program was
12 because he was not granted parole by the Governor of
13 Oklahoma, and they found that, I guess, in Judge Lumpkin's
14 opinion, dispositive of the issue is the fact he was not
15 granted parole by the Governor of Oklahoma, right?

16 MISS WINTER: No --

17 QUESTION: That's what it says. I'm reading it
18 on page 40a of the record. It says, dispositive -- maybe
19 it's a different case or something.

20 MISS WINTER: I believe --

21 QUESTION: 40a of your -- of their petition.

22 MISS WINTER: The Court may be looking at the
23 district, the U.S. district court opinion.

24 QUESTION: I'm looking at page 40a of the
25 appendix, where it says, Gary Lumpkin, the presiding --

1 maybe it's a different case, or --

2 QUESTION: The white brief?

3 QUESTION: Yes, the white brief. Maybe -- is
4 this the district court?

5 Well, my question is this. I read that, and I
6 thought that the reason they -- we have a finding here,
7 what I thought was -- it says Court of Criminal Appeals of
8 Oklahoma, order denying application for writ of habeas
9 corpus.

10 It's in the petition for certiorari, and what it
11 says when I read it -- maybe I'm asking this because you
12 can clarify it for me -- is it says, dispositive of the
13 issue in petitioner's case is the fact he was not granted
14 parole by the Governor of Oklahoma. It is for this, not a
15 disciplinary reason, that he was removed from the program.

16 So I thought everybody agrees to that, that --
17 that's -- am I right? Is that right, or am I mixing it
18 up, or what?

19 MISS WINTER: I -- looking at everything that
20 the court of appeals says, they say that we believe that
21 the procedure, that is, the procedure that says --

22 QUESTION: I'm not asking about procedure.

23 QUESTION: This is -- are you talking -- when
24 you say court of appeals, are you talking about the Tenth
25 Circuit or the --

1 MISS WINTER: No, the --

2 QUESTION: -- Court of Criminal Appeals that
3 Justice Breyer is talking about?

4 MISS WINTER: -- Court of Criminal Appeals.

5 QUESTION: Yes. I'm saying -- what I'm trying
6 to find out is -- is, isn't it -- what seems to be true is
7 that he's saying, this judge, that the reason that your
8 client was removed from the program was because he was not
9 granted parole by the Governor.

10 MISS WINTER: Yes, but it seems to --

11 QUESTION: All right. Now -- all right. If
12 that's so, I don't think your client disputes that he was
13 not granted parole.

14 MISS WINTER: That's correct.

15 QUESTION: Am I right about that?

16 MISS WINTER: That's correct.

17 QUESTION: All right. So what is -- the basic
18 rule, I thought, of the due process law, it's so basic
19 that nobody ever says it, that you don't have to have a
20 hearing under the Constitution or any other rule if
21 there's nothing to have a hearing about --

22 MISS WINTER: That's --

23 QUESTION: -- and if, in fact, he was removed
24 because he wasn't given parole, and if that isn't in
25 dispute, what would there possibly be in this case to have

1 a hearing about?

2 MISS WINTER: I don't think that that is what
3 the Court of Criminal --

4 QUESTION: I know it isn't what they said. All
5 I want to know is, is if the underlying facts are correct,
6 that it is that he was removed, that there was a finding
7 in this court, a State court, that the reason his PP,
8 whatever it is, was revoked is because he wasn't given a
9 parole.

10 MISS WINTER: Yes.

11 QUESTION: Yes.

12 MISS WINTER: Correct.

13 QUESTION: All right. If that's correct, and he
14 doesn't dispute that, then what is there to have a hearing
15 about, and if there is nothing to have a hearing about,
16 where in the Constitution does it require a court or an
17 agency or anyone to have a hearing when there is nothing
18 to have a hearing about?

19 MISS WINTER: There's a -- the purpose of having
20 a hearing here is exactly the same as it is in Morrissey.
21 That is, here, the triggering event for a hearing, they
22 say now, can be the Governor refuses to grant parole.
23 That becomes --

24 QUESTION: Well, it's not just they say, it's
25 the Court of Criminal Appeals of Oklahoma that says.

1 MISS WINTER: That's fine. We won't quarrel
2 with that. When the Governor denies parole under this
3 framework, that becomes a triggering event for a hearing,
4 but --

5 QUESTION: Well, but you say it becomes a
6 triggering event. That suggests that there are other
7 issues to be inquired into. But what if the rule in
8 Oklahoma is simply, when the Governor denies parole,
9 you're recalled, period?

10 MISS WINTER: That would be a different case.

11 QUESTION: Well, how -- but there isn't any
12 intimation in the opinion of the Oklahoma Court of
13 Criminal Appeals that more factors somehow are involved.

14 MISS WINTER: But I think there is. The Court
15 of Criminal Appeals said, and the Attorney General relies
16 on it, they said that what this framework provides is that
17 he may be brought back in, which means that a
18 determination is being made.

19 QUESTION: Nobody says that parole revocation is
20 a necess -- there might be other reasons why you might
21 revoke a person's pre-parole. What I take it is the case
22 here is that this would be a sufficient reason under
23 Oklahoma law.

24 You have a judge of Oklahoma suggesting in the
25 paragraph that it is a sufficient reason --

1 MISS WINTER: But --

2 QUESTION: -- under Oklahoma law. It's not true
3 under Oklahoma law at that time that it was a sufficient
4 reason to revoke his PPCS? What would we look to as a
5 matter of Oklahoma law to establish that?

6 MISS WINTER: Why don't we assume that it is a
7 sufficient reason, just as a parole violation is a
8 sufficient reason, but the court doesn't stop -- the court
9 says you can't stop with a sufficient reason. Once you --

10 QUESTION: Well, wait a minute. What if the
11 statute itself expressly said, denial of parole subsequent
12 to having been granted pre-parole status is sufficient, in
13 and of itself, to be grounds for removal from that status?
14 Suppose the statute said it just that way. Would you be
15 here? Would you have a case?

16 MISS WINTER: I think that that would be a
17 different case.

18 QUESTION: Well, the suggestion being made to
19 you is it is the same case as when an Oklahoma court says
20 that is what State law is. How do you have a case if you
21 wouldn't have under a statute that said it expressly when
22 you have an Oklahoma court decision that that's the
23 Oklahoma law? I think that's the question.

24 MISS WINTER: Would you mind posing the question
25 to me again?

1 QUESTION: Well, it's the same -- I mean, to add
2 to that is, of course you might be entitled to a hearing
3 if it were in dispute as to whether the Governor had in
4 fact or not revoked the parole, but there is no dispute --

5 QUESTION: But isn't there another factor
6 everybody's overlooking? The Oklahoma procedure spelled
7 out in 41a of the appendix is that 1) the inmate is denied
8 by parole by the Governor, but their cases shall be
9 reviewed by the parole board 90 days from denial to
10 determine whether that statute will be continued,
11 indicating that the denial is not -- it may be a
12 sufficient reason, but it's not always a sufficient
13 reason.

14 QUESTION: And that's true now, but that wasn't
15 true then.

16 QUESTION: That's the new rule.

17 MISS WINTER: The assertion that it wasn't true
18 then is nothing but an assertion. There's absolutely
19 nothing in the record, it seems to me -- I don't see it in
20 the Court of Criminal Appeals' opinion or anywhere else.

21 QUESTION: Well, they document when the new
22 rules came in. Well, let's see if we can get agreement on
23 a basic proposition. That is, suppose Oklahoma law was,
24 you're denied parole. The denial of parole by the
25 Governor means you go back, no ifs, ands, or buts, there

1 wouldn't be any due process, right, would there, if that
2 were the situation?

3 MISS WINTER: I would agree.

4 QUESTION: So the question is, is that what we
5 have in this case?

6 You would agree that there's no need for a
7 hearing if it follows like the night the day the Governor
8 denies parole, you're required to go back.

9 MISS WINTER: I do have one caveat. It seems to
10 me that there are circumstances in which you could have a
11 problem, a substantive due process problem, in having
12 automatic revocation for a reason that is utterly
13 irrational when you're talking about a precious --

14 QUESTION: The reason is, the Governor denies
15 parole. The Governor has the discretion to grant or deny
16 parole. The Governor denies parole. The rules are,
17 denial of parole, you go back to prison.

18 MISS WINTER: In a situation like this, where it
19 happens quickly, I think that makes it like a furlough
20 problem and that there's no problem with that. The statute
21 says that.

22 QUESTION: Well, the question is, is that what
23 this statute says, because a 90-day period didn't come in
24 until later.

25 MISS WINTER: The record has so much evidence,

1 including a dozen statements by the Attorney General in
2 its briefs. It's a very -- it's a late argument that the
3 statute means anything other than that it is
4 discretionary.

5 There are literally a dozen times that the
6 Attorney General has said it in its briefs to this Court
7 and the lower court. There are the documents that Mr.
8 Harper himself signed saying that there were options in
9 the event of parole, and saying that his continuing out
10 remained on his compliance with conditions, and finally,
11 the only evidence in the record as to what the statute
12 means, whether or not there's discretion, are
13 regulations -- a number of sets of regulations by the
14 Pardon and Parole Board, and a set of regulations by the
15 Department of Corrections which appears in the appendix to
16 their cert petition.

17 QUESTION: That is an essential part of your
18 case, though. You -- in order to get to the due process
19 procedural point you have to establish that there was not
20 an automatic revocation of pre-parole status if parole was
21 denied, that that was not the rule.

22 MISS WINTER: Yes, that that was not the policy.

23 QUESTION: Does the record tell us whether there
24 were -- I think your opponent said there were something
25 like 1,200 people in the program, and does the record tell

1 us whether or not when other people had their parole
2 denied they were automatically taken off the program?

3 MISS WINTER: No, the record doesn't tell us
4 that. At the time that he was in the prison, when he was
5 let out of the prison the record is completely silent.

6 QUESTION: I suppose then the question is, who
7 has the burden of establishing what the rule of law was?

8 MISS WINTER: Well, it seems to me that --

9 QUESTION: Your client was the plaintiff in the
10 Federal court. I would think he would have the burden.

11 MISS WINTER: Our client was pro se. He asked
12 for an evidentiary hearing --

13 QUESTION: Well, does that change the burden
14 because he was pro se?

15 MISS WINTER: I think it changes the burden that
16 he asked for an evidentiary hearing in the Court of
17 Criminal Appeals and in the Federal courts. This is an
18 issue that is --

19 QUESTION: Well now, wait a minute. We're kind
20 of sliding around several things here. It's -- I take it
21 it's up to the Court of Criminal Appeals of Oklahoma to
22 decide whether or not someone is pro se would change the
23 burden of proof there. Are you saying that as a matter of
24 Federal law, a Federal court must shift the burden of
25 proof because a plaintiff is pro se?

1 MISS WINTER: I'm not sure that it's -- I think
2 that the pro se habeas plaintiff is entitled at some stage
3 to a full and fair hearing.

4 QUESTION: Well, he's got a right to a full and
5 fair hearing on disputed facts.

6 MISS WINTER: This is a fact that at the time
7 was not disputed. If the State had come in and said to
8 our client, which they did not, the reason we brought you
9 back in is because it's mandatory, everybody is being
10 brought back in, he could have tried to controvert that.
11 He could have answered that.

12 Instead, they argued two things that were
13 clearly not true. One, that he was in confinement, and
14 that's what everyone's fire was directed at. Is he in
15 confinement? Is he in prison?

16 And two, they made an argument that was so
17 palpably untrue that no one could accept it, namely that
18 he became ineligible. That became a mantra that we
19 sometimes heard, but we know from the statute that he does
20 not become ineligible for pre-parole once parole is
21 denied.

22 QUESTION: Well, isn't that argument the same as
23 the argument that he had to go back? Once parole was
24 denied, he had to go off of pre-parole?

25 Now, you say it's so inherently incredible. I

1 mean, maybe. Why is it incredible that that would be the
2 policy?

3 MISS WINTER: No, I don't think it's at all
4 incredible. I'm only saying that the Attorney General of
5 Oklahoma has contradicted that position many, many times
6 in its briefs to this Court and to the lower courts, and
7 that it never asserted its automatic --

8 QUESTION: Indeed, if that were the law, they
9 couldn't have adopted the 90-day procedure.

10 MISS WINTER: No. It became put in a bind in
11 the court of appeals. In the court of appeals they first
12 asserted a person becomes ineligible.

13 QUESTION: You're talking about now the Tenth
14 Circuit?

15 MISS WINTER: No, the --

16 QUESTION: The Court of Criminal Appeals.

17 MISS WINTER: Criminal Appeals, and the Court of
18 Criminal Appeals said in an interim order, which is in the
19 record, please show me the -- I want to see the law.
20 Where are the regulations that say they become ineligible?
21 At which point the Attorney General produced 004-11, which
22 says you get a review in 90 days, making it clear that it
23 wasn't mandatory.

24 That's what the Court of Criminal Appeals, the
25 very issue it was interested in, and that is the document

1 the Attorney General gave it, and I don't think that the
2 Court of Criminal Appeals found either that there was an
3 unvarying practice at the time, because that factual
4 question never, never arose in the court of appeals.

5 QUESTION: What -- what --

6 MISS WINTER: It simply didn't arise.

7 QUESTION: I've another question. Assuming --
8 for this I'm assuming you're right that really the
9 standard was vague, and there are all kinds of reasons
10 for -- any nonarbitrary, nondiscriminatory, nonprotected
11 reason they could revoke this. All right, on that
12 theory -- on that theory, why is your client entitled to a
13 hearing?

14 To be quite specific, there are lots of things
15 called intermediate punishments involving half-way houses,
16 involving nights and weekends in prison, involving a whole
17 host of experimental things, and what you've heard the
18 State say is, you know, we're not going to experiment if
19 to experiment means that every time we change our mind
20 about any person we have to go through some tremendous
21 procedural process.

22 MISS WINTER: A half- --

23 QUESTION: So what is your response? What is
24 the -- which of those half-way intermediate punishments,
25 in your view, trigger the procedural protection, which

1 don't? How do you distinguish the one from the other?

2 MISS WINTER: I think it's not too -- I'm sure
3 there could be grey areas, but at this point I've seen
4 nothing that's a seriously grey area. A half-way house,
5 you're still in prison. You're in a State facility.
6 You're not in your own home or in your own bed, and you're
7 constantly --

8 QUESTION: Home under house arrest would be
9 different?

10 MISS WINTER: That could be different.

11 QUESTION: The line they want to draw is a line
12 which says, look to whether authorities have retained
13 virtually total discretion to revoke it. Under those
14 circumstances, the prisoner doesn't have an expectation of
15 remaining free, unlike parole, where you're releasing the
16 prisoner, giving the prisoner an expectation of remaining
17 free but for certain specified circumstances.

18 Now, that's their line, and so I'm asking you
19 what's your line?

20 MISS WINTER: That it's not just about
21 expectations, it's being out of prison, and that once
22 you've crossed the threshold of the prison door and you
23 are told get a life, get a job, go to work, pay your
24 bills, have relations with other human beings, have
25 friends and family and come and go and go to the movies

1 and to the grocery store, you know that you're not in
2 prison, and when you know that you're not in prison,
3 something very precious has happened, and it shouldn't be
4 taken away without a hearing.

5 That's what I would say, and I know when I'm in
6 a half-way house that I'm still in prison, and it may be
7 that when I have a -- and be electronically surveilled all
8 day, I know I'm not in -- I know that I am in prison,
9 because something of the essence of freedom is having a
10 choice to obey the rules or not, instead of because every
11 minute you're being electronically surveilled or
12 surveilled by a guard.

13 This is a man who knew that he wasn't in prison,
14 and that's why he's entitled to a hearing, for that reason
15 and because the State retained the discretion to pick and
16 choose, to send some people back to prison when the
17 Governor denied parole and to let others stay out.

18 QUESTION: But I thought you said the record
19 simply didn't show on that point.

20 MISS WINTER: I think that the reason it doesn't
21 show is because it's a newly developed theory of the case.

22 QUESTION: Well, but then you really don't have
23 the factual basis to say the Governor -- that -- or the
24 board retained discretion, if the record simply doesn't
25 show what happened to other people whose parole was denied

1 by the Governor.

2 MISS WINTER: Well, Chief Justice, it seems to
3 me that even if, in 1990, when Ernest Harper was let out
4 of prison, there was an unvarying practice of bringing
5 people back to jail when parole was denied by the
6 Governor, that wouldn't necessarily show that there was a
7 policy.

8 The evidence that their -- the evidence that
9 they think that they have discretion to do it is in the
10 later enacted regulations, and it may be that they felt
11 like bringing everybody back in last week and this week
12 they feel like leaving everybody out, but they've already
13 said it's the toss of a coin, and it seems to me that that
14 kind of reasoning shouldn't be determining the very
15 precious right that's at stake here.

16 QUESTION: They didn't say it is. They said it
17 could be --

18 MISS WINTER: It could be.

19 QUESTION: -- as far as the Constitution is
20 concerned, because there's nothing to which due process
21 right could attach, a due proces procedural right.

22 Do we know whether anyone else was exposed to
23 this telephone call, or whatever it was, shall return to
24 the prison within 5 hours? Was that -- how long did the
25 situation persist before the 90-day procedure came into

1 play?

2 MISS WINTER: That was -- that regulation came
3 into being 5 months after he was returned to prison in
4 August, I believe.

5 QUESTION: May I ask if there was a statutory
6 change during that 5-month period?

7 MISS WINTER: There was a statutory change as
8 follows. There is one -- And there was -- there's been a
9 couple of misstatements of the record that I would like to
10 clear up here, and I'm not sure of the significance of
11 this --

12 QUESTION: Before you do, will you tell me what
13 the statutory change was?

14 MISS WINTER: It's one that says -- there's an
15 identical provision for both parolees and pre-parolees,
16 and I believe they were enacted at the same time, and that
17 provision says, if you don't keep up with the educational
18 and job requirements that we put on you as a condition,
19 you will become ineligible for parole, and that's the only
20 thing --

21 QUESTION: And does either the statute before or
22 after that amendment make any reference to the Governor's
23 denial of parole as a reason for terminating pre-parole?

24 MISS WINTER: No, neither before nor after.

25 One other thing --

1 QUESTION: But we do have this opinion of the
2 Oklahoma Court of Criminal Appeals, is it?

3 MISS WINTER: Yes.

4 QUESTION: Which denied the respondent's writ of
5 habeas at the State level saying, dispositive of the issue
6 in petitioner's case is the fact that he was not granted
7 parole by the Governor. It is for this, not a
8 disciplinary reason, he was removed from the pre-parole
9 program.

10 So do we interpret that as meaning that the
11 criminal appeals court thought that not being granted
12 parole was a valid and sufficient reason for revocation of
13 pre-parole status, and that in this very case that was the
14 reason? I mean, it seems to me what the Oklahoma court is
15 saying.

16 MISS WINTER: I believe that what they're saying
17 is that it is -- they are --

18 QUESTION: What if we read it that way anyway?

19 MISS WINTER: May I -- I just want to make sure
20 that I'm understanding the question. I do not believe
21 that what they're saying is, you must be brought in, that
22 they did not understand it to mean that.

23 QUESTION: That's not the question.

24 MISS WINTER: They -- they understood it --

25 QUESTION: The court understood that dispositive

1 of the habeas petition in this very case is the fact that
2 he was not granted, eventually, parole by the Governor,
3 and it was for that reason that his status was revoked,
4 not for some disciplinary reason or some other reason.

5 MISS WINTER: I believe that I misspoke
6 before --

7 QUESTION: Now, what if we interpret that -- not
8 you. What if we, this Court thinks that that constitutes
9 a valid explanation of what the State law was at the time
10 of this revocation?

11 MISS WINTER: Then it seems to me that you
12 should find -- you should say that the State law denies
13 due process, and that people must have a hearing,
14 because --

15 QUESTION: A hearing to do what, because I think
16 as -- first, there's no dispute on the fact that it wasn't
17 any disciplinary reason, right? You concede --

18 MISS WINTER: Yes.

19 QUESTION: -- that the only reason given --

20 MISS WINTER: Yes.

21 QUESTION: -- was that the Governor denied
22 parole, so there'd be no hearing to decide what was the
23 reason. Everybody agrees that he didn't commit any
24 disciplinary offense. He was a model --

25 MISS WINTER: Yes.

1 QUESTION: -- pre-parolee, and he was called
2 back for one reason only, that parole was denied.

3 MISS WINTER: In parole -- a person can admit
4 that they have violated a condition of their release and
5 they're still entitled to a hearing because there's a
6 second decision. The parole board is exercising
7 discretion.

8 And Morrissey says, and Gagnon says, and Black
9 v. Romano -- it's dictum, but it goes on at considerable
10 length -- says, once you're exercising -- that's just the
11 first step, did he violate parole, because if they can say
12 he violated but we'll leave him out, then you want to have
13 a chance to argue that you should be one of those people
14 who --

15 QUESTION: Are you saying that as a result of
16 this pre-release, pre-parole scheme that the discretion
17 the Governor previously had, which I assume was
18 unreviewable, is now in some sense subject to a due
19 process requirement simply because he was on release
20 before the Governor made his discretionary decision? Is
21 that your argument?

22 MISS WINTER: No, not at all, Justice Souter,
23 because there's a huge difference between parole --
24 refusal to grant someone parole and bringing them back
25 into prison.

1 QUESTION: But all the examples --

2 QUESTION: I think the argument you're making is
3 that this excerpt from the Court of Criminal Appeals only
4 establishes that denial of parole is a permissible
5 reason --

6 MISS WINTER: Yes.

7 QUESTION: -- for revoking pre-parole, not that
8 it is an automatic and mandatory reason. That isn't
9 established.

10 MISS WINTER: Yes.

11 QUESTION: And your point is that if it is only
12 a permissible reason, he should have the opportunity to
13 argue that in this case it shouldn't be permitted.

14 MISS WINTER: Exactly.

15 QUESTION: Which is the purpose of the 90-day --

16 QUESTION: And in support of that you quote from
17 page 11 -- 41a of the opinion, the last paragraph, where
18 it says the Governor's -- where it says, we believe such a
19 procedure gives an inmate sufficient notice when he is
20 placed on the program that he may be removed from it when
21 the Governor exercises his discretion.

22 MISS WINTER: Yes, exactly.

23 I believe that the Criminal Court of Appeals
24 understood it to be discretionary.

25 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Winter.

1 The case is submitted.

2 (Whereupon, at 2:00 p.m., the case in the above-
3 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:

LEROY L. YOUNG, ET AL., Petitioners v. ERNEST EUGENE HARPER

CASE NO. 95-1598

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

BY *Don Niani Federico*

(REPORTER)