

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KENNETH LYNCE, Petitioner v. HAMILTON MATHIS,
SUPERINTENDENT, TOMOKA CORRECTIONAL
INSTITUTION, ET AL.

CASE NO: No. 95-7452

PLACE: Washington, D.C.

DATE: Monday, November 4, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KENNETH LYNCE, :

4 Petitioner :

5 v. : No. 95-7452

6 HAMILTON MATHIS, :

7 SUPERINTENDENT, TOMOKA :

8 CORRECTIONAL INSTITUTION, :

9 ET AL. :

10 - - - - -X

11 Washington, D.C.

12 Monday, November 4, 1996

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 1:00 p.m.

16 APPEARANCES:

17 JOEL T. REMLAND, ESQ., Orlando, Florida; on behalf of
18 the Petitioner.

19 PARKER D. THOMSON, ESQ., Assistant Attorney General of
20 Florida, Miami, Florida; on behalf of the Respondent.

C O N T E N T S

| | | |
|----|------------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | JOEL T. REMLAND, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | PARKER D. THOMSON, ESQ. | |
| 7 | On behalf of the Respondents | 28 |
| 8 | | |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: The Court will hear
4 argument now in Number 95-7452, Kenneth Lynce v. Hamilton
5 Mathis.

6 Mr. Remland.

7 ORAL ARGUMENT OF JOEL T. REMLAND

8 ON BEHALF OF THE PETITIONER

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

11 Petitioner challenges a 1992 Florida State law
12 which retroactively redefined punishment prescribed for a
13 1985 offense, in violation of the Ex Post Facto Clause.
14 Petitioner committed his offense in 1985. He pled nolo
15 contendere and was sentenced in 1986 in accordance with
16 the sentencing formula prescribed by Florida law.

17 The punishment formula in effect at the time of
18 petitioner's offense and at the time of his sentencing
19 provided that a prisoner's actual term of incarceration
20 was equal to the guidelines sentence imposed by the judge
21 less all gain time awarded.

22 The State granted petitioner overcrowding gain
23 time credits from 1987 in the form of administrative gain
24 time through 1991 in the form of provisional release
25 credits. Due to the award of those credits, and pursuant

1 to statutory law, the State established a release date for
2 October 1 of 1992. As petitioner's mandatory non --

3 QUESTION: Mr. Remland, may I interrupt you for
4 a moment? Can you tell me whether the figure that the
5 State arrived at in determining what the release date was
6 was calculated under the statute that was in existence at
7 the time of the offense, the '83 statute which is set out
8 on page 27 of the lodging, or whether that figure was
9 calculated under one of the later statutes?

10 I -- in candor, I had assumed that it was
11 calculated under one of the successor statutes, but I want
12 to make sure on that.

13 MR. REMLAND: Yes, sir, Justice Souter. It was
14 calculated under one of the successor statutes in 1988,
15 the --

16 QUESTION: Okay. Now, if we to -- I'm sorry.
17 If we were to conclude that under the Ex Post Facto Clause
18 the only statute that should be considered was the one in
19 effect at the time of the offense, I take it the figure
20 that they calculated and the date which they arrived at
21 would have been different.

22 MR. REMLAND: It's hard to say, because the
23 actual statute in effect in 1985, which was 944-598, had
24 not been triggered at that point, and the credits did not
25 start to issue until a successor statute administrative

1 gain time supplanting provisional -- supplanting the
2 emergency gain time statute kicked in --

3 QUESTION: So you --

4 MR. REMLAND: -- and the actual credits could be
5 used, I believe, according to the statutes in effect when
6 the credits were granted, and I would submit to the
7 Court --

8 QUESTION: Yes, but that may not support an Ex
9 Post Facto argument. That might support -- just assume
10 for the sake of argument here that that might just support
11 a due process claim, which is not what we have before us,
12 and I take it the only thing we can say for sure is that
13 if the calculation were made under the statute as in
14 existence at the time of the offense, we don't know that
15 the number arrived at would have been the same number that
16 was awarded under the later statute.

17 MR. REMLAND: I believe the number would have
18 been the same, for two reasons. First of all, in 1985
19 the -- Mr. Lynce was offense-eligible. The petitioner was
20 offense-eligible, and the percentage for the threshold was
21 98 percent. The two key criteria was the same. The
22 formula in 1983 all the way through, until 1992, when the
23 second, harsher, more oppressive formula was enacted, that
24 changed the situation. But the basic formula was the same
25 from 1983 through 1985.

1 QUESTION: Mr. Remland --

2 QUESTION: Well, I thought your principal
3 response to this was that it simply was not raised in the
4 opposition to the petition for certiorari.

5 MR. REMLAND: That is correct. It was not -- it
6 was never raised to the petition for certiorari. The
7 first time they --

8 QUESTION: When we took this case we thought we
9 were dealing with a situation which involved a change of
10 the punishment that existed at the time the crime was
11 committed.

12 MR. REMLAND: Justice Scalia, you did, as a
13 matter of fact, because in 1985, when the offense was
14 committed, the offense formula was basically the same as
15 it was in '83 earlier under the statute.

16 QUESTION: Well, does that mean we should decide
17 this case on a factually erroneous premise, the fact that
18 it wasn't raised in the brief in opposition?

19 MR. REMLAND: I think that the actual issue was
20 presented squarely under the statute in effect at the time
21 of the offense under the emergency gain time statute which
22 Mr. Lynce was eligible for under 98 percent of population
23 cap, and he was offense-eligible according to law.

24 QUESTION: That statute was applied to no one,
25 ever, right? It was never applied, that statute.

1 MR. REMLAND: That statute, although it wasn't
2 triggered in 1986, the cap was reached and the Governor
3 declared a special emergency. We went into special
4 session, and the percentage was raised to 98 percent. It
5 would have been triggered. These --

6 QUESTION: That was all later, but the statute
7 that was on the books at the time the offense was
8 committed is a statute that was never applied to anyone.
9 It's a little hard to talk about anything ex post facto
10 with respect to a law that was never applied to anyone.

11 MR. REMLAND: It's our position that the statute
12 that was in effect in 1985 was essentially the same
13 statute that was in effect in 1988 when the credits were
14 being granted, and moreover there's no question that the
15 effect of the change substantially increased the
16 petitioner's punishment, and that would constitute a
17 violation of the ex post facto law, the Ex Post Facto
18 Clause.

19 It's clear that we've got a substantial increase
20 in punishment over that that occurred at the time of the
21 offense, and the statutory formula in 1985 was
22 established. The petitioner was clearly eligible for
23 credits.

24 QUESTION: But Mr. Remland, what about -- the
25 statute that was in place was an emergency statute. Could

1 one really say that it was going to operate, or it wasn't
2 at all highly speculative what would become of that
3 emergency measure, then?

4 It's not like your punishment is X, and your
5 good time credit is Y. It was a brand new thing on an
6 emergency basis, and could one say not this -- this is --
7 I know what this is?

8 MR. REMLAND: Justice Ginsburg, the formula was
9 adopted in 1983 under the Sentencing Reform Act, and that
10 formula was the sentence of the Court minus the gain time
11 equals the actual sentence. In this particular matter,
12 Florida statute 921 authorized any and all gain time to be
13 deducted from the actual sentence imposed, and in 1985 and
14 1986 there was an overcrowding problem, there's no
15 question about that, and that overcrowding problem
16 continued.

17 The contention or speculative nature of these
18 credits doesn't really impact the fact that the effect of
19 the '92 act totally and retroactively increased the
20 measure of punishment. It stiffened the measure of
21 punishment. It increased the measure of punishment over
22 the statutory formula under 921, the sentencing guidelines
23 law that was in effect at the time of the offense that
24 provided a provisional and mandatory release date.

25 QUESTION: But may -- on that point, may I ask

1 you a variant of Justice Ginsburg's question? I've gone
2 over the statute as you've provided it to us in the
3 lodging, the statute that was in effect at the time of the
4 offense, and it's not clear to me from reading that
5 statute whether any reduction that did not result in the
6 release of a particular prisoner would have survived the
7 termination of the emergency.

8 It is not clear to me from the statute, for
9 example, that if your client got a 30-day reduction at
10 some point because there was an emergency during his
11 incarceration, but he was not released as a result of it
12 because the reduction didn't get him down to that point,
13 it's not clear to me from the statute that the reduction
14 would have sort of remained on the books, if you will, as
15 a permanent reduction in his sentence once the population
16 had dropped down and that emergency was passed.

17 And I guess my question is, isn't that another
18 reason for saying that under the statute as it existed
19 when he committed his offense it is at best speculative
20 whether he would have obtained the kind of long-term
21 permanent reduction benefit that you are claiming he has
22 been denied improperly here?

23 MR. REMLAND: Justice Souter, the focus of the
24 inquiry for ex post facto purposes should be the effect of
25 the '92 law. Not so much emphasis should be placed on the

1 speculative nature of whether or not the trigger is going
2 to be reached.

3 QUESTION: But I think what I'm trying to get at
4 is that the effect of the '92 law depends on what he might
5 have been entitled to under the law that was changed and
6 if, in fact, under the law that was changed, under the '83
7 act if that's what we're going to consider, it is not even
8 clear that he would have been entitled to retain his
9 credit beyond the termination of the emergency during
10 which it was granted, then I can't say that the later
11 statute took away anything.

12 At best I would say, well, it's speculative as
13 to whether it took away anything. There's no case law
14 telling me how to read this in your client's favor, and
15 that's the difficulty I have.

16 MR. REMLAND: Justice Souter, the statutes in
17 this case that provided the overcrowding gain time had no
18 provisions which allowed revocation or forfeiture. These
19 credits, once granted, were --

20 QUESTION: But my difficulty is, they don't have
21 any provision that clearly says that the gain time under
22 the emergency statutes survives the emergency. I just
23 don't know. Is there something in the text --

24 MR. REMLAND: Yes.

25 QUESTION: -- that you could point to --

1 MR. REMLAND: Yes.

2 QUESTION: -- that says, this becomes
3 permanently vested?

4 MR. REMLAND: Yes. I think that the statute
5 921, and its subsequent statutes, provide what's been
6 referred to repeatedly as the nondiscretionary,
7 irrevocable release date.

8 QUESTION: Where's the irrevocable language in
9 the statute?

10 MR. REMLAND: The irrevocable language --

11 QUESTION: Have you got it in front of you? Do
12 you have the statute in front of you?

13 MR. REMLAND: Not immediately in front of me,
14 but we've --

15 QUESTION: Okay.

16 MR. REMLAND: -- lodged the documents with the
17 Court in the lodged documents, but it's under 921.001 and
18 it specifically near the end of that statute, paragraph
19 10, and in paragraph 8, the language is specifically that
20 your sentence is specifically determined by the amount of
21 time the court imposes minus any and all gain time, and
22 that is your release date.

23 In that release date the word shall is used, and
24 in 1988 when they adopted the provision of release date
25 statutes, they clarified that.

1 QUESTION: Even if there's no overcrowding?
2 MR. REMLAND: Yes, sir.
3 QUESTION: If there's no overcrowding at the
4 time --
5 MR. REMLAND: Yes, sir.
6 QUESTION: -- you nonetheless get released
7 early?
8 MR. REMLAND: Yes, sir, because the release date
9 uses the word shall. Once you've got the release credits
10 granted to you, there is nothing under Florida law that
11 allows the State to revoke those credits. That's why
12 there's a provisional release dates, and that's why --
13 QUESTION: Have the Florida courts so
14 construed --
15 MR. REMLAND: Yes --
16 QUESTION: -- that measure?
17 MR. REMLAND: The provisional release date is a
18 mandatory, statutory --
19 QUESTION: Why is called provisional, then?
20 MR. REMLAND: Because --
21 QUESTION: I understood it was called
22 provisional because you only get your overcrowding time if
23 there's overcrowding.
24 MR. REMLAND: The word provisional is used --
25 before they used the word provisional, Justice Scalia,

1 they used -- they used release date, they used -- there's
2 several different words that they've used, but in each
3 case the language of the statute is crystal clear, and it
4 says that a person shall be released on that date.

5 The reason they use the name provisional is
6 because they adopted a successor statute to emergency gain
7 time in 1988 called provisional release credits.

8 QUESTION: Well, didn't that depend on whether
9 the prison was overcrowded to a certain percentage or not?

10 MR. REMLAND: Yes, Justice O'Connor.

11 QUESTION: Isn't that how it's calculated?

12 MR. REMLAND: Justice O'Connor --

13 QUESTION: Now, what if he were sentenced under
14 an earlier statute that didn't provide the provisional
15 release credits based on prison overcrowding. He was
16 sentenced under another regime that provided some gain
17 time but not this overcrowding concept, and the
18 legislature after sentencing then enacts a provisional
19 release law based on overcrowding.

20 After the sentencing, after the commission of
21 the crime, after sentencing they enact this thing, and
22 then later they amend it or repeal it. Is there some ex
23 post facto problem at that time?

24 MR. REMLAND: I would believe that there would
25 be an ex post facto problem if you, by the grace of the

1 legislature as stated in Weaver, confer benefits, for
2 example, then take them away, and resulting in a huge
3 increase --

4 QUESTION: But in Weaver -- in Weaver, it
5 depended upon what existed at the time the offense was
6 committed.

7 MR. REMLAND: As I this case as well. We're not
8 contending here or submitting that the hypothetical,
9 Justice O'Connor, that you posed is necessary for relief
10 in this case.

11 QUESTION: No, but suppose that were what
12 happened, how does ex post facto doctrine help in that
13 situation?

14 MR. REMLAND: It would appear that the cases
15 dealing with ex post facto doctrine have dealt primarily
16 with two points, whether or not the law is retrospective
17 and, number 2, whether it results in a significant or
18 substantial increase in the measure of punishment and if,
19 in fact, after the sentencing, a new version of the
20 statute --

21 QUESTION: A new benefit is enacted.

22 MR. REMLAND: A new benefit, Justice O'Connor,
23 as you indicate, was conferred, and that benefit --

24 QUESTION: Provisionally, based on the extent of
25 population of the prison.

1 MR. REMLAND: Yes, Justice O'Connor, but like
2 in this case there's also a good conduct provision as
3 well.

4 QUESTION: Well, what if in the meantime, before
5 it had ever been applied, the State just built another
6 prison, so it never came into operation.

7 MR. REMLAND: It --

8 QUESTION: Problem?

9 MR. REMLAND: It's not --

10 QUESTION: Did the defendant lose something?

11 MR. REMLAND: In this particular case the
12 defendant lost 5 years, and had 5 years added to his
13 sentence.

14 QUESTION: No, under the hypothetical, please.

15 MR. REMLAND: Yes, Justice O'Connor.

16 QUESTION: What would the defendant have lost?

17 MR. REMLAND: I think he would lose the
18 possibility of a sentence reduction based upon the new
19 provision.

20 QUESTION: The new law, but how is that ex post
21 facto if we look at the time of the crime and the
22 sentence?

23 MR. REMLAND: It's not clear from looking at
24 Supreme Court cases in the past whether or not that --

25 QUESTION: Well, if your argument is that broad,

1 you lose me. Do you have a fallback position that it only
2 applies to those credits that he would have received under
3 the law in effect in 1985?

4 MR. REMLAND: Our position, Justice O'Connor, is
5 that the formula in 1985 was in place, and that provided
6 him with a statutory formula for ex post facto analysis
7 against the harsher, more onerous formula that was enacted
8 in 1992 by retroactive application through the Attorney
9 General's rein --

10 QUESTION: Mr. Remland --

11 QUESTION: Well, does your argument depend at
12 all on the fact that the State retroactively revoked
13 already awarded gain time credits? Is that your focus?

14 MR. REMLAND: Yes, ma'am.

15 QUESTION: Would you be here under any other
16 scenario?

17 MR. REMLAND: I think the eligibility for future
18 credits as emphasized in the Weaver case and also the
19 nature of the increase in -- in Miller, for example, in
20 Miller v. Florida, where a new guideline amendment, a new
21 formula, if you will, was used to make a harsher
22 punishment --

23 QUESTION: Mr. Remland, I don't think you've
24 made a point clear that I think is really of vital
25 importance. Don't you claim that under the 1983 statute

1 your client had right, a statutory right to overcrowding
2 credits not in a then emergency, but if a later emergency
3 occurred when there was a 98-percent population in the
4 statute?

5 MR. REMLAND: Yes, Justice Stevens.

6 QUESTION: And that was the formula your client
7 had a right to at the time the offense was committed.

8 MR. REMLAND: Absolutely.

9 QUESTION: And the formula that was actually
10 applied also was a 98-percent formula, wasn't it?

11 MR. REMLAND: Absolutely. They were both 98
12 percents, and they were both -- he was offense-eligible in
13 1985, and it was at 98 percent. He was offense-eligible
14 in 1992, until they retroactively excluded him for
15 eligibility and canceled all the credits and also future
16 eligibility.

17 QUESTION: Well, do you think at the time the
18 prisoner was committing the attempted murder that he took
19 into calculation the fact that there might be prison
20 overcrowding, and so --

21 MR. REMLAND: I --

22 QUESTION: -- it has some ex post facto effect?

23 MR. REMLAND: I do not believe, Justice
24 O'Connor, that an individual who's committing a crime on
25 the outside is thinking in terms of what specific gain

1 time statutes might exist, and I don't think that kind of
2 a reliance interest is required for a claim under the ex
3 post facto clause.

4 However, I do think that reliance is one of the
5 interest as well as expectations that the ex post facto
6 clause addresses. However, I think in this case in 1985,
7 when the offense was committed, through 1986, there was
8 real overcrowding, there was an overcrowding formula,
9 Justice Stevens, as you pointed out, in 1985 that made him
10 98 percent -- the population cap was there at 98 percent,
11 and the overcrowding was there, and there were newspaper
12 articles coming out.

13 And the Governor in 1986, one month prior to the
14 time of the plea in this case, went into special session
15 and raised the trigger from 98 percent to 99 percent, so
16 there's maybe an objective reliance here on the part of
17 any petitioner in this particular situation, especially
18 when we have in place since 1985 and earlier a statutory
19 formula under --

20 QUESTION: Mr. Remland, suppose Florida had
21 said, we are enacting a statute that doesn't give anybody
22 any right to anything until the moment that there is
23 overcrowding, and when they're -- when and if the
24 overcrowding occurs, they will get credits, but those
25 credits will exist only as long as the overcrowding. Once

1 there's no more overcrowding, no more accumulation, and we
2 wipe away any that exist if you haven't gotten out. That
3 kind of statute, then, would have no constitutional
4 problem, would it?

5 MR. REMLAND: As long as the statute didn't
6 cancel credits already awarded in the past, I think --

7 QUESTION: This statute says these credits you
8 accumulate, and if you get out while we're still
9 overcrowded, that's all right, but when we build the new
10 prison, they're wiped out. Is there any constitutional
11 problem with Florida doing that?

12 MR. REMLAND: I don't -- Florida's done that,
13 Judge -- Judge Ginsburg in the controlled release statute
14 which was passed in 1989 and got up and running in 1991.
15 That statute has within its parameters a method of
16 reducing and changing the release date based upon changes
17 in population. The statute is being -- if the statute is
18 applied in a prospective manner, not retroactively,
19 creating a harsher punishment, I don't see a
20 constitutional problem with addressing overcrowding
21 through the prospective application of law.

22 QUESTION: Mr. Remland, may I interrupt you,
23 because I --

24 MR. REMLAND: Yes, Justice Souter.

25 QUESTION: -- you're getting back to a point

1 that I think we're all concerned with here.

2 I thought I had gotten into the question whether
3 Florida under the '83 act was awarding credits that would
4 survive the overcrowding or were not surviving the
5 overcrowding, so that -- and your answer to me was their
6 credits survived the emergency.

7 MR. REMLAND: Yes.

8 QUESTION: The emergency was over, you still
9 retain the credits.

10 MR. REMLAND: Yes.

11 QUESTION: So you were saying to me the statute
12 we've got is not the kind of statute that Justice Ginsburg
13 was asking you the hypothetical about. And you said the
14 reason for the permanence of the credits was 921.001,
15 subsections 8 or 10.

16 MR. REMLAND: Yes, sir.

17 QUESTION: Well, I've got that out, and it's on
18 page 10 of the lodging. Do you have a copy of the lodging
19 with you?

20 MR. REMLAND: Yes, sir.

21 (Pause.)

22 MR. REMLAND: You say page 10?

23 QUESTION: Yes.

24 (Pause.)

25 MR. REMLAND: Yes, sir.

1 QUESTION: Okay. Now, down in the -- I don't
2 get a subsection 10 there, but I get a subsection 8, and
3 subsection 8 provides that a person convicted of a crime
4 after a certain date, and so on, will be released from
5 incarceration only (a) upon expiration of the sentence,
6 (b) upon expiration of the sentence as reduced by
7 accumulated gain time, or, and there's a third
8 alternative.

9 Now, I take it that your answer to me depends on
10 the fact that the statute uses the word accumulated. I
11 take it your argument is that it wouldn't make any sense
12 to refer to accumulated gain time unless the gain time
13 survived the emergency. Is that sort of the nub of your
14 position?

15 MR. REMLAND: Absolutely, Justice Souter.

16 QUESTION: All right. Does the word -- my
17 question is, and I probably should know this from reading
18 the briefs but I'm not sure, does the word gain time
19 include not only this provisional gain time that is
20 awarded in the case of emergencies, but the other kinds of
21 gain time which reduce a sentence for good behavior and so
22 on? Does the word gain time include all of that?

23 MR. REMLAND: Yes, sir.

24 QUESTION: Well then, isn't it the case that we
25 really cannot say that the fact that gain time is referred

1 to as accumulated gain time, we can't infer from that that
2 the emergency kind of gain time is accumulated as opposed
3 to, let's say, the good behavior kind of gain time. Is
4 that fair to say?

5 MR. REMLAND: I think it's fair to say, Justice
6 Souter, that the meaning and the use of the statutes in
7 this case refer to gain time and -- in all its different
8 forms, such as --

9 QUESTION: Some of which may accumulate under
10 the statute governing it, and some of which may not.

11 MR. REMLAND: The use of these statutes in
12 Florida since 1983 and the analysis of the way they've
13 been operating is that the gain time accumulates unless
14 there's a discipline problem, and --

15 QUESTION: Even under the emergency statute?

16 MR. REMLAND: Yes, sir. The --

17 QUESTION: And so you're saying administrative
18 practice, even though there's no court decision on it and
19 even though the statute doesn't expressly address it, the
20 administrative practice is to make it a permanent gain.

21 MR. REMLAND: Absolutely.

22 QUESTION: Even under the emergency statute.

23 MR. REMLAND: There's no provision for --

24 QUESTION: There's no way there would have
25 gotten 1,800 days of gain time otherwise, is there?

1 MR. REMLAND: That is absolutely correct, and he
2 was released by the Department of Corrections on October 1
3 of 1992 and told to go home, you're released on your
4 provisional release date, which is mandatory under the
5 law. The 1988 version of this statute, which I believe is
6 subparagraph 10, Justice Souter, says that you shall be
7 released on your provisional release date, and that's on
8 page 12.

9 QUESTION: Okay.

10 MR. REMLAND: And I think --

11 QUESTION: But basically your argument is, is an
12 argument that construes the statute in accordance with the
13 actual administrative practice until they got this statute
14 that hauled this poor man back, is that it?

15 MR. REMLAND: Absolutely, and --

16 QUESTION: Okay.

17 MR. REMLAND: And even the Florida supreme court
18 cases have looked at all these different gain times and
19 said they're basically the same. In Griffin v. Singletary
20 for example, the Florida supreme court stated that the
21 provisional release credit statute is the same as the
22 administrative gain time statute, and in Dugger v. Rodrick
23 the Florida supreme court lumped all of these population
24 control statutes together and said they're called
25 population control statutes.

1 QUESTION: Well, did it lump those together with
2 good behavior gain time?

3 MR. REMLAND: The Florida supreme court has
4 carved out sort of an exception and tried to distinguish
5 between good behavior incentive gain time on the one hand
6 and overcrowding gain time on the other. I believe --

7 QUESTION: Yes, but you don't get the
8 overcrowding gain time unless you also qualify for good
9 behavior, do you?

10 MR. REMLAND: Absolutely, Justice Stevens. As a
11 matter of fact, these credits, Justice Stevens, are
12 nothing more than good time credits during periods of
13 overcrowding, and as Arnold v. Cody out of the Tenth
14 Circuit noted, the contingent nature of the credits
15 emanating after the effective date of the act really just
16 shows you the credits are being awarded. It's an issue of
17 retroactivity.

18 In this particular matter, the real key issue is
19 whether the effect of the law, the focus of the inquiry as
20 in Moralis v. Department of California Department of
21 Corrections was that did this changed formula in 1992
22 substantially stiffen the measure of punishment? Did it
23 increase? Did it make it more onerous than the formula
24 that Mr. Lynce, the petitioner herein, was eligible for,
25 98 percent in 1985, and not excluded because of his

1 offense?

2 QUESTION: Suppose that you had this system and
3 the State then passed a new statute which had a 90-percent
4 trigger point, but it -- and it provided for immediate
5 release to keep it at 90 percent, and it excluded people
6 that were convicted of murder or attempted murder, would
7 that -- and the effect of that was to keep your client in
8 jail. Would that be a violation of the ex post facto
9 rule?

10 MR. REMLAND: Justice Kennedy, I think that
11 Florida, because of the overcrowding crisis, should be
12 able to address this crisis in any manner it feels
13 reasonable with prospective laws. If they deny Mr. Lynce
14 or anybody else eligibility because of a prior crime that
15 he committed, then it delves into the area of violating --

16 QUESTION: No, no. No, they have a new cap at
17 90 percent. They just exclude certain offenders,
18 including your client. Hence, because of the 90-percent
19 cap, they release people, and he'll never reach the 98, so
20 in effect they've taken away from him his credit. Would
21 that be lawful?

22 MR. REMLAND: If they enact any formula that
23 makes it more harsh or more onerous to someone who's
24 already had another formula under an earlier --

25 QUESTION: They don't make it more harsh. They

1 just provide something for somebody else. What's the
2 difference in that and building a new prison? I take it
3 that there'd be no violation if they build a huge new
4 prison and they never reach the 98 percent cap.

5 MR. REMLAND: That's correct. That's correct.

6 QUESTION: Well, what's the difference in that
7 and my hypothetical?

8 MR. REMLAND: I guess it wouldn't be any
9 difference unless it impacted him adversely from the prior
10 formula. I think you have to just look at both formulas.
11 If it doesn't adversely affect the overall sentence in
12 terms of the duration of his actual term of incarceration,
13 then it wouldn't be a violation of ex post facto. The
14 only test is whether or not the new formula is harsher or
15 more oppressive than the earlier formula, sort of like --

16 QUESTION: Well, the new formula that I
17 stipulated is more lenient to everybody but its -- doesn't
18 apply to him, so that it makes inoperable his.

19 Well, I guess you've answered the question.

20 QUESTION: Does this formula have to be in the
21 statute? Suppose the prison system just has a policy that
22 when there's -- or they're under injunction from a Federal
23 court that they can't have so many -- more than so many
24 people in their institutions, and they institute a policy
25 that when we have so many we will let out first of all the

1 pickpockets, and let's assume your client's a pickpocket.

2 Now, would that policy which was in effect at
3 the time he was arrested for pickpocketing, would that
4 have to be continued, or else the ex post facto
5 prohibition of the Constitution violated?

6 MR. REMLAND: Justice Scalia, I think that the
7 policy you're discussing would seem to be rather
8 discretionary, and perhaps it wouldn't necessarily be
9 having the effect of law, or the --

10 QUESTION: Well, it wasn't effect of law. It
11 was a regulation that was adopted by the present
12 administrator. Pursuant to his authority the legislature
13 told him, you have to comply with the Federal court
14 decree. You decide -- you know, you decide the people
15 that can best be released upon the public, and he said
16 pickpockets, and he issued that in a regulation. Now, is
17 it your position that that administrative measure becomes
18 part of the sentence that the person is --

19 MR. REMLAND: Justice Scalia, I don't believe an
20 administrative regulation that doesn't have a tightened
21 control or mandatory nature to it would be the same as the
22 statute that we have in this case that guarantees a
23 certain formula for sentencing.

24 QUESTION: If it's for administrative purposes,
25 I don't see how the fact that it's adopted by regulation

1 versus statute should make any difference. Is that the
2 distinction?

3 MR. REMLAND: I think it's the effect. Of
4 course, if the effect has a substantial impact and that
5 effect --

6 QUESTION: The effect's the same. He's a
7 pickpocket and he would have gotten out if that measure
8 had been continued.

9 MR. REMLAND: It appears to pose an ex post
10 facto issue and a problem if there is in effect increasing
11 punishment.

12 QUESTION: Thank you, Mr. Remland.

13 Mr. Thomson, we'll hear from you.

14 ORAL ARGUMENT OF PARKER D. THOMSON

15 ON BEHALF OF THE RESPONDENTS

16 MR. THOMSON: Mr. Chief Justice and may it
17 please the Court:

18 The ex post facto clause is implicated here only
19 if the 1992 statute that terminated the application of the
20 provisional release credits for Mr. Lynce increased the
21 quantum of punishment attached to his crime from the date
22 it was committed. That is the definition of an ex post
23 facto law.

24 A statute must increase the quantum of
25 punishment at that -- over that which existed at that

1 point of time, or it is simply not subject to ex post
2 facto attack, whatever other bases there may for attacking
3 it.

4 In looking at the provisional release credits,
5 or the other forms of overcrowding credits adopted by
6 Florida in response to a serious overcrowding problem, a
7 Federal court decree, a settlement of that Federal court
8 case, and then the adoption of certain policies later
9 encapsulated into statute, all of those procedures we
10 submit were not penal. In fact, their purpose was the
11 opposite of penal. It was remedial and procedural.

12 The 1992 act and all the other acts adopted over
13 this period of time were attempted solutions to that same
14 large problem that Florida was confronting.

15 QUESTION: Well, Mr. Thomson, assume that under
16 the law in effect in 1985 the defendant would have been
17 entitled to certain gain time credits based on good
18 behavior and other things, and he went along earning those
19 credits until all of a sudden the State passes a
20 retroactive law that takes away gain time credits already
21 accumulated for him. Can it do that? Is there an ex post
22 facto problem there?

23 MR. THOMSON: The Weaver case tells us that
24 there is. The Weaver case involved basic gain time.
25 Florida remodeled its basic gain time statute to leave the

1 credits where they were, but to modify them prospectively,
2 and this Court held that the State of Florida could not do
3 that. It couldn't modify them at all.

4 Now, I interpret that aspect of gain time as
5 written in Weaver in part by the reference in the Moralis
6 case in 1995 to Weaver being part of a trilogy, the
7 trilogy being the Lindsey case in 1937, Weaver, and the
8 Miller case in 1987.

9 MR. THOMSON: Those were -- Lindsey and Miller
10 were clearly sentencing cases, and I interpret Weaver --

11 QUESTION: All right, but you're losing me a
12 little bit. In this particular case, up until 1992, had
13 the defendant accumulated some gain time credits?

14 MR. THOMSON: I'm sorry, I didn't understand
15 your --

16 QUESTION: Until 1992 --

17 MR. THOMSON: Yes, Your Honor.

18 QUESTION: -- had this defendant accumulated
19 some gain time credits?

20 MR. THOMSON: Yes, Your Honor.

21 QUESTION: And the law passed in 1992 made him
22 ineligible for that retroactively.

23 MR. THOMSON: It made him -- the law passed in
24 1992 made him ineligible for provisional credits. He had
25 basic gain time accumulated. He had some incentive gain

1 time accumulated. The law did not touch those.

2 QUESTION: And he also had some gain time based
3 on overcrowding.

4 MR. THOMSON: He had gain time based on
5 overcrowding broken into two components, one under --

6 QUESTION: But he had some.

7 MR. THOMSON: Yes, Your Honor.

8 QUESTION: And then the State passes a new law
9 and makes it retroactive.

10 MR. THOMSON: Right.

11 QUESTION: And you say that the ex post facto
12 doctrine does not apply to that.

13 MR. THOMSON: Correct, Your Honor. I -- we say
14 that it does not apply not only because the statutes
15 from -- which were the -- which were take -- in which
16 something was taken away from him did not exist at the
17 time that he committed his crime. Not only that, but
18 because those kinds of statutes involved here were not
19 penal.

20 An ex post facto law turns on penal statutes.
21 These laws were not directed in any way at punishing the
22 individual inmate.

23 QUESTION: Well, but they certainly affected the
24 time the inmate would serve.

25 MR. THOMSON: There are lots of things that

1 affect the time that an inmate will serve that have
2 nothing to do with the fact of whether punishment is being
3 imposed on him.

4 In this case, the State was dealing with
5 problems that had nothing to do with individual inmates.
6 They were not for the purpose of controlling an inmate.
7 They were not for the purpose of rewarding an inmate.
8 They were to deal with a serious problem of overcrowding
9 which required early release of certain -- a certain
10 number of people which the State moved back and forth in
11 light of its other obligation, which was to, as best it
12 could, protect the safety of the streets, and therefore
13 decided who it --

14 QUESTION: I might understand your argument
15 better if it applied across the board, but it as I
16 understand it the statute took away the provisional gain
17 time from a class of offenders, dangerous people,
18 including an attempted murderer, and I'm not sure how to
19 square that with your assertion that this was not to
20 punish.

21 MR. THOMSON: Justice Kennedy, it was no more to
22 punish than the Moralis case, which applied a different
23 rule to a certain class of prisoners, in that case double
24 murderers. The overcrowding --

25 QUESTION: Well, but the rationale in that case

1 was that it was unlikely that there would be really any
2 difference. Here, it is clear there was a difference.

3 MR. THOMSON: The overcrowding was not by
4 itself. Overcrowding resulted in the release of people,
5 and you can look at the Florida statutes, and they looked
6 at who it was that was going to be released, what
7 classifications of people, and they said, certain classes
8 of people should not be released to the streets to take
9 care of an overcrowding problem.

10 This changed from time to time as overcrowding
11 became a greater or a less problem.

12 QUESTION: But why isn't that a judgment that
13 one crime is more culpable or more dangerous than another,
14 and therefore more deserving of incarceration? That
15 sounds like punishment to me.

16 MR. THOMSON: Indirectly it has -- it makes a
17 judgment of who are more likely to cause a problem by
18 early release. There is no change of the sentence of
19 anybody, those that are released or those that are not
20 released. The sentence remains what it was.

21 QUESTION: I take it that deterrence is one of
22 the central rationales for punishment, and you're saying
23 that --

24 MR. THOMSON: Retribution and deterrence are the
25 two classes.

1 QUESTION: And that you're saying that
2 deterrence or prevention, I suppose, is the rationale
3 here.

4 MR. THOMSON: You're not trying to prevent a
5 crime. You are simply deciding if you are going to take
6 care of a problem called overcrowding -- I've got too many
7 people in the prisons and I don't have enough space, and
8 I've got to let a certain number of them on the streets.
9 Then I make judgments within that determination of who
10 should and should not be released consistent with my
11 obligation as a legislator to best protect public safety.

12 QUESTION: Well, may be that's a good argument
13 for a prospective law to that effect, but how does that
14 justify a retrospective law that affects people who've
15 already been awarded credits and are out?

16 MR. THOMSON: Insofar as the ex post facto
17 clause goes, it seems to me that it is not -- the ex post
18 facto clause is not involved because we are going to go
19 and take a look back at 1985.

20 There may be other constitutional issues. Due
21 process, Eighth Amendment problems, and certain other
22 problems that may exist, but it is not an ex post facto
23 problem, which is the one that is before the Court --

24 QUESTION: Well, why isn't it an ex post facto
25 problem if there was a 1983 statute on the books that

1 authorized the gain time when the prison population
2 exceeded 98 percent, the same formula that you used under
3 the labor statutes? Why isn't that an ex post facto
4 problem?

5 MR. THOMSON: The 1983 statute is interesting,
6 because in the first place it was entitled Early Release
7 of Prisoners.

8 QUESTION: Titled Emergency --

9 MR. THOMSON: It was not classified -- excuse
10 me?

11 QUESTION: Entitled Emergency Release of
12 Prisoners.

13 MR. THOMSON: Emergency Release of Prisoners.

14 QUESTION: Right.

15 MR. THOMSON: It was not -- when you look at the
16 history of that 1983 law, which is in the lodged
17 documents, you know, gain time provisions, and then the
18 special emergency release of prisoners, it says we're
19 going to take care of the serious problems created under
20 the Federal court --

21 QUESTION: No, it says it will take care of it
22 if the population reaches 98 percent. It looked to the
23 future.

24 MR. THOMSON: That is correct.

25 QUESTION: So that the emergency had not

1 necessarily occurred at the time that statute was passed.

2 MR. THOMSON: No. There was an overcrowding
3 problem consistently all along, but clearly it never was
4 released under that -- I mean, it never was reached under
5 that statute because that statute was never applied.

6 QUESTION: It was -- they were released under
7 the formula that was set forth in that statute, which was
8 incorporated into a later statute. In the 98 percent
9 formula was incorporated in the later statute which
10 actually gave rise to his credits.

11 MR. THOMSON: That aspect of it was. The later
12 statutes had exceptions. They were different statutes.
13 The 1992 --

14 QUESTION: And was more discretionary than the
15 earlier statute. The earlier statute has mandatory
16 language in it --

17 MR. THOMSON: Correct.

18 QUESTION: -- that the later ones don't.

19 MR. THOMSON: They were discretionary. All the
20 subsequents were first discretionary, and then they had
21 specific exceptions of people that they would not reach,
22 which changed from time to time.

23 QUESTION: But whatever -- whatever happened
24 later, he was entitled under the earlier statute because
25 he qualified under the later one, which was even less

1 generous.

2 MR. THOMSON: Well, we do not know whether he
3 ever would have qualified under the earlier statute
4 because it was never applied.

5 QUESTION: Well, sure we do, because it was a
6 98-percent formula, and you calculated the 98-percent
7 formula later and gave him 1,800 days of credits.

8 MR. THOMSON: If in fact what was done in 1983
9 was cast in stone as part of this person's sentence, which
10 I submit that it was not, then it never could have been
11 changed at any time.

12 QUESTION: Well, of course, gain time is never
13 cast in stone as part of a person's sentence.

14 MR. THOMSON: If --

15 QUESTION: We discovered that with the Weaver
16 case.

17 MR. THOMSON: If, in fact, any time after 1985,
18 any time there was available a 98-percent -- I mean, you
19 reach 98 percent, it was mandatory to release him and
20 there were no exceptions that would apply to him, then you
21 are casting in stone the first effort that Florida made to
22 deal with an overcrowding problem, and you have said that
23 that was part of his punishment.

24 I submit, Your Honor, that the early release of
25 prisoners by reason of overcrowding was never part of his

1 punishment. It was never part of his sentence. It had no
2 relationship to what he did in prison. There was no
3 aspect of reward. It was neither retributive nor was it
4 deterrent. It simply said if, in fact, Florida has a
5 problem unrelated to you that is not taken care of in a
6 whole variety of ways, then this statute could --

7 QUESTION: Yes, but I just want to be clear,
8 your argument really depends on -- assumes that the
9 releases could have been under the 1983 statute, but
10 they're still not covered because it's a collateral effect
11 that caused him to become eligible.

12 MR. THOMSON: Exactly.

13 QUESTION: Yes. That's right.

14 MR. THOMSON: He would have been at most --

15 QUESTION: Right.

16 MR. THOMSON: -- an incidental beneficiary of
17 those statutes.

18 QUESTION: And that would have been true under
19 the '83 statute or the later statutes -- yes.

20 MR. THOMSON: That would have been true of any
21 overcrowding statute, Your Honor.

22 QUESTION: Mr. Thomson, assume for the sake of
23 argument that the terms of the '83 statute would be
24 enforceable under the ex post facto clause.

25 Assume, secondly, though you correct me if you

1 think this is wrong, but at least for the moment assume
2 that under the statutory scheme as it existed at the time
3 of the offense in '83 one simply couldn't tell one way or
4 the other whether one of these emergency credits would, in
5 fact, survive the emergency if the individual was not
6 released.

7 And assume, number 3, if you will, and again
8 correct me later if you think this is wrong, but assume
9 for now, as opposing counsel said, that the credits have
10 in fact, even under the emergency provisions, the
11 emergency credits have been accumulated and have survived
12 the emergencies as a matter of administrative practice.
13 That's what they've been doing.

14 My question is this. Is there anything in --
15 was there anything in Florida law at the time of the
16 offense in '83 that made it -- that would have provided,
17 or did provide that the administrative practice had to be
18 what in fact it was? Was there anything in Florida law at
19 that time that says you're supposed to accumulate rather
20 than not accumulate?

21 Or, conversely, would it be fair to say that in
22 '83 what the administrators did was a matter of their
23 grace. They could either accumulate or not accumulate.
24 It was purely up to them, and nobody could say what they
25 ought to do.

1 Which was it?

2 MR. THOMSON: Mr. Justice Souter, are you
3 referring to any aspect of gain time, or are you referring
4 only --

5 QUESTION: Just the emergency gain time.

6 MR. THOMSON: -- to overcrowding?

7 QUESTION: Just the emergency gain time. Was
8 there any -- any law, outside of the confines -- confines
9 of what we have in the lodging, that would have indicated
10 that the administrators were supposed to accumulate this,
11 or, conversely, were the administrators free to do
12 anything they wanted simply as a matter of grace? They
13 could either accumulate it and retain it beyond the
14 emergency or not, as they saw fit.

15 MR. THOMSON: In 1983 there was nothing.

16 QUESTION: Okay.

17 QUESTION: How does this -- I don't know if you
18 can explain it. Maybe you can just refer me to a source,
19 but it does seem if you could refer me to a source as to
20 how these statutes work, it would be helpful.

21 As I read 598 and then 277 and 276, it seems to
22 me they're identical but for the fact that the latter uses
23 the word 60 days and may, and the former uses the word
24 shall and 30 days as far as we're interested here.

25 What it says you're supposed to do is that, when

1 it hits 98 percent, then you start reducing the prison
2 population, and you do it by giving each person in 5-day
3 increments up to 30 days' gain time. Where did we get the
4 number 1,800 from?

5 It said up to 30 days, and what I -- as I read
6 it literally it sounded as if you have 1,000 people in the
7 prison, they're all there under 25 years, which means
8 they're really only 10 years, and then -- after you
9 eliminate all the regular gain time they're there for 10
10 years.

11 And then what you do is, you look through the
12 whole 1,000, you give each of these 1,000 people 30 days
13 off their sentence, which will do nothing for prison
14 overcrowding because they're not supposed to be released
15 for a long time anyway, but they all get lighter
16 sentences, and then you come down finally to it might be
17 one person who's about to get out tomorrow, so he gets
18 out.

19 I mean, how does this work?

20 MR. THOMSON: With Your Honor's permission, it
21 will take a minute.

22 QUESTION: Well, if it takes too long you might
23 just refer me to a source.

24 MR. THOMSON: Well, I'll try and give it to you
25 quickly. There were four statutes. The first, the

1 emergency release of prisoners, has been referred to in my
2 response to Justice Souter, and that is the one that had
3 30 days in 5-day --

4 QUESTION: That's what I'm talking about.

5 MR. THOMSON: And no exceptions.

6 The next one was called administrative gain
7 time. That's 276. It was adopted in 1987.

8 QUESTION: My only question is how you get from
9 the words 30 days, or 60 days, to the 1,800 that he
10 accumulated.

11 MR. THOMSON: Well, the second one, the one I've
12 just mentioned, administrative gain time, said up to 60
13 days, and so once an emergency was declared by the
14 administrator, referred to the Governor, the Governor
15 assented, it came back, and the Secretary allocated days
16 from zero to 60 to that particular instant and assigned
17 them to the block of people that were in the eligible
18 pool.

19 QUESTION: And how do we get to 1,800?

20 MR. THOMSON: Well, you get -- actually, if
21 you --

22 QUESTION: Did it happen 31 times?

23 MR. THOMSON: No. It happened a slew of times,
24 and it happened sometimes with a lot less than that. It
25 happens incidentally to have been over 31 months, and

1 there were 60 days, so you --

2 QUESTION: It happens each month.

3 MR. THOMSON: -- might mistakenly think that
4 there was a direct multiplication, and there isn't. In
5 fact, there were a whole set of certifications and
6 determinations by the Secretary over the period of time
7 that the provisional credits were given, which was from
8 1988 until the beginning of 1991.

9 QUESTION: Okay. Then my question would be
10 this. The statute says, really, what you're saying is
11 that that's what shall happen. The statutes say it shall
12 happen. They say it shall happen as of 1983.

13 Now, since they say it shall happen and you have
14 a later statute that comes along that says in his case it
15 shall not happen, how can we look at it as other than you
16 had a later statute that made his sentence more harsh.

17 Now, what you were starting to say was --

18 MR. THOMSON: Well, I said --

19 QUESTION: -- because the purpose is different.

20 MR. THOMSON: I said --

21 QUESTION: But if the purpose is different, I
22 guess if you had a good purpose you could double
23 everybody's sentence on that theory.

24 MR. THOMSON: Oh, no. His sentence never
25 changed. His sentence was given to him. It was 22 years.

1 If you accept Weaver, it was shortened by basic gain time
2 at the date of the sentence, because that's the way basic
3 gain time is handled. You lopped about 6 or 7 years off
4 of it.

5 You then have incentive gain time, which in fact
6 the Florida court has construed Weaver applies to and
7 therefore could not be taken away. Those are things that
8 are within his control at least. He can handle those.
9 There's something he can do about those. He can work. He
10 can earn gain time. It cannot be taken away from him.

11 The overcrowding credit in fact relates to the
12 releasing of prisoners. In fact, it shouldn't be looked
13 at until you have to release a prisoner, and during that
14 period of time you ought to be able to adjust to your
15 needs.

16 In fact, for administrative purposes, because
17 the Florida system is so large, credits were booked with
18 respect to these individuals so that they did have an
19 accumulation. It was related to these two statutes,
20 administrative --

21 QUESTION: General Thomson, does the record tell
22 us how much of the 1,860 days were overcrowding credits
23 and how much was the other kind of gain time you refer to?

24 MR. THOMSON: Yes, Your Honor. On page 52 of
25 the Joint Appendix there is zero -- of course, it's not

1 named. There's zero under the 1983 statute, because it
2 was never, ever brought into effect either before the day
3 he committed his crime or thereafter.

4 QUESTION: Whereabouts on page 52 are you
5 reading from, Mr. --

6 MR. THOMSON: I was saying -- I was saying, Your
7 Honor, there is a figure called 335, which is next to
8 administrative gain time awarded. That is administrative
9 gain time that was under the 1-year statute. It was not
10 taken away from him by the 1992 law, and it is not
11 challenged here, but you should know that in fact once the
12 overcrowding issue was ameliorated and the Costello decree
13 was terminated, the legislature revoked all administrative
14 gain time and provisional release credits. That's beyond
15 the time of this statute.

16 So at the time this was written, he still had
17 335 days on the book for administrative gain time. It
18 says 1360. That is a typographical error below that. It
19 means 1,860 as is shown by the previous page of the
20 affidavit. That is the amount of time that had been
21 booked for him with respect to provisional credit.

22 QUESTION: Just so I'm perfectly clear, the
23 1,860 is all overcrowding gain time.

24 MR. THOMSON: It is, Your Honor, as is the 335.

25 QUESTION: So at least as a matter of

1 administrative practice these additional increments of
2 gain time were accumulated.

3 MR. THOMSON: That is correct, because the
4 alternative was that each day you had an overcrowding
5 problem you would recalculate, and that seemed to be, one
6 would say, a little bit a waste of time, so you -- as long
7 as you had a consistent overcrowding problem, once you
8 assigned credits to a person they were just left there.

9 QUESTION: What do you mean when you use the
10 expression, booked, Mr. Thomson?

11 MR. THOMSON: I mean that they were entered in
12 his record, and that continued until 1989, the fourth
13 effort, which is called controlled release in Florida, in
14 which, starting as of January of '91, these matters of
15 overcrowding were assigned to the -- a controlled release
16 authority, which is really the Parole Commission under
17 another name, and there is no booking with respect to
18 those credits at any time for Mr. Lynce because they were
19 handled differently, and that's the method of dealing with
20 overcrowding that started in 1991 and terminated finally
21 in 1994, when the last overcrowding release occurred in
22 the State of Florida.

23 QUESTION: Mr. Thomson, your argument, or at
24 least a large part of your argument is that you shouldn't
25 count this because it's not punishment. It had nothing to

1 do with punishment. It had to do with administrative
2 needs, administrative efficiency.

3 But isn't the same thing true of good behavior
4 release time as well? That has nothing -- you know,
5 earned credits for good time credits. That has nothing to
6 do with the heinousness of the crime. It has nothing to
7 do with what is deserved punishment. It has to do with
8 giving people an incentive to behave themselves so that it
9 will be easier to manage the prison.

10 MR. THOMSON: You are correct, Your Honor. All
11 gain time -- other than the overcrowding issue, all the
12 gain time is hooked in some fashion to prison management.
13 There is no doubt of that.

14 QUESTION: Which suggests that our prior case
15 law is an impediment to the argument you're making to us.

16 MR. THOMSON: Your Honor.

17 QUESTION: Because we have certainly held that
18 you can't take away good time credits, change the system
19 under which you earn them retroactively.

20 MR. THOMSON: What is -- what this Court has
21 held in the Weaver case is that basic gain time, which is
22 the one aspect of gain time that is assigned to an
23 individual at the day he enters the prison and therefore
24 may be deemed part of the sentence for purposes of how
25 judges approach it, how defense attorneys and prosecutors

1 approach it, that this Court -- I can read Weaver a bunch
2 of ways, but if I read Weaver as a sentencing case, and
3 when this Court refers it to as a trilogy with Lindsey and
4 Miller it seems to me clearly it is, then basic gain time
5 as part of that initial factor makes some sense as being
6 treated as part of the sentence, and I take that as a
7 given.

8 QUESTION: Basic gain time, how is it -- does it
9 make any difference, other -- is basic gain time assigned
10 on the basis of the length of the sentence?

11 MR. THOMSON: Yes, Your Honor. It is a certain
12 number of days in the statute for years, and it goes up.

13 QUESTION: Does it depend on anything else,
14 other than the length of the sentence?

15 MR. THOMSON: In fact, the way it operates it
16 does not. That is, it's there, and you've got it, unless
17 you do something that causes it to be revoked. Incentive
18 gain time is handled differently, and of course the
19 overcrowding credits themselves are, it seems to me,
20 Justice Scalia, for an entirely different purpose. They
21 aren't related to the individual prisoner and what he
22 does.

23 To be sure, prison management is a goal for him
24 to get a result, but if he does it, he gets it.

25 Overcrowding is in effect an externality. Not

1 only is it iffy, in response to --

2 QUESTION: Well, you --

3 MR. THOMSON: -- Justice Souter's question, but
4 it's an externality. They -- you -- there's nothing he
5 can do.

6 QUESTION: It's conditioned on good behavior,
7 though, as you told us earlier, so to that extent it is
8 still somewhat conditioned upon his own behavior.

9 MR. THOMSON: No, I did not say that, Your
10 Honor. The incentive -- the provisional credits, there is
11 in the statute a -- the words that provisional credits are
12 available only to a person who is earning incentive time.

13 The Florida supreme court has interpreted that
14 to mean that that's just the pool of people. The pool of
15 people that are eligible for those during the period of
16 time that they were given, those overcrowding credits, are
17 those that were earning incentive time and are not subject
18 to one of the exceptions that were contained in the
19 statute. That's just a pool of persons, a definition of
20 who will be available, or who will be treated for
21 overcrowding credit.

22 QUESTION: I'm not sure what -- I'm not sure
23 what you mean by -- I'm not sure how that responds to my
24 point. He has to place himself within that pool by his
25 good behavior, no?

1 MR. THOMSON: He has to earn incentive gain
2 time, yes.

3 QUESTION: Okay.

4 QUESTION: What was the universe for measuring
5 overcrowding? Was it the entire Florida correction
6 systems, or was it prison by prison?

7 MR. THOMSON: I believe, Your Honor, it was the
8 system. I believe, Your Honor, it was the system.

9 QUESTION: That's what the statute says.
10 Ninety-seven percent of lawful capacity of the system.

11 MR. THOMSON: Correct.

12 QUESTION: Yes.

13 MR. THOMSON: If there are no further
14 questions --

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Thomson. The case is submitted.

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

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