

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RANDY G. SPENCER, Petitioner v. MIKE KEMNA,
SUPERINTENDENT, WESTERN MISSOURI
CORRECTIONAL CENTER

CASE NO: 96-7171

PLACE: Washington, D.C.

DATE: Wednesday, November 12, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RANDY G. SPENCER, :

4 Petitioner :

5 v. : No. 96-7171

6 MIKE KEMNA, SUPERINTENDENT, :

7 WESTERN MISSOURI CORRECTIONAL :

8 CENTER :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, November 12, 1997

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

15 APPEARANCES:

16 JOHN W. SIMON, ESQ., Jefferson City, Missouri; on behalf
17 of the Petitioner.

18 JAMES R. LAYTON, ESQ., Chief Deputy Attorney General of
19 Missouri, Jefferson City, Missouri; on behalf of the
20 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 96-7171, Randy G. Spencer v. Mike Kemna.

5 Mr. Simon.

6 ORAL ARGUMENT OF JOHN W. SIMON

7 ON BEHALF OF THE PETITIONER

8 MR. SIMON: Mr. Chief Justice, and may it please
9 the Court:

10 In September 1992 the State of Missouri revoked
11 Randy Spencer's parole on the basis of the Board of
12 Probation and Parole's finding that he had committed
13 forcible rape, armed criminal action, and possession of
14 crack cocaine.

15 After exhausting his State remedies, Spencer
16 filed a Federal habeas corpus action asserting Federal
17 constitutional violations concerning this revocation which
18 would, if recognized, have required the court to hold it
19 invalid.

20 About 4 months after Spencer filed his petition,
21 the State released him on parole again for good behavior,
22 but without expunging the order of revocation or
23 abandoning its finding that he was guilty of these three
24 serious felonies.

25 Nearly 2-1/2 years after he filed his petition,

1 the district court dismissed it as moot.

2 In conflict with the decisions of every other
3 United States court of appeals that had then issued a
4 published opinion dealing with the subject, the court
5 below affirmed the district court's dismissal.

6 An official governmental finding that one is
7 guilty of forcible rape, armed criminal action, and
8 possession of crack cocaine has collateral consequences
9 like those of a criminal conviction per se.

10 QUESTION: It does? I thought that if you're
11 convicted of a crime, A, then under the guidelines in many
12 States when you're convicted of crime B your sentence
13 automatically goes up, and I thought that wasn't true
14 here, that if your parole is revoked there is no guideline
15 or statute that says you get an increased sentence because
16 of a parole revocation, though of course they could give
17 you an increased sentence on the basis of that for which
18 the parole was revoked.

19 MR. SIMON: Justice Breyer --

20 QUESTION: Am I wrong, because -- yes.

21 MR. SIMON: Justice Breyer, I've two responses
22 to that.

23 The first is that although it is not automatic
24 in the case, it is not automatic that under the guidelines
25 you would get it -- you would get a higher sentence solely

1 on the basis of the parole revocation, the parole
2 revocation can force one's offense into the 15-year
3 window --

4 QUESTION: I thought -- am I not -- what I was
5 saying is, I thought that that which does it is not the
6 parole revocation, it is that for which the parole was
7 revoked.

8 In other words, the defendant would always have
9 a chance to say, but I didn't do this thing, I didn't
10 commit -- I didn't do that for which, and then the parole
11 board or whoever, the court would consider, did he do it
12 or didn't he do it. You can't do that if you're convicted
13 of a crime.

14 I just want to know if I'm right. Is that right
15 or not?

16 MR. SIMON: I agree with --

17 QUESTION: Tell me if I'm --

18 MR. SIMON: I agree with what you're saying,
19 Justice Breyer, but in Sibron this Court -- this Court
20 considered that question in respect to criminal
21 convictions --

22 QUESTION: All right, but I mean, the first part
23 was, is that right, and then if I'm right, then why --
24 then you're going to explain why it doesn't matter. Go
25 ahead.

1 MR. SIMON: Well -- yes. Thank you, Your Honor.
2 You are right.

3 You are right in that the parole revocation does
4 not have exactly the same effect under the Sentencing
5 Guidelines as a criminal conviction.

6 However, to put the burden on the petitioner and
7 then defendant in the -- under the guidelines of
8 impeaching the parole revocation years after the fact has
9 the same things wrong with it that it would have in the
10 Sibron situation, where this Court said that we shouldn't
11 require people to come in years after the fact when they
12 have proceeded to litigate the claims under the rules as
13 Sibron and Randy Spencer have done.

14 QUESTION: But in Lane v. Williams we said that
15 the same factors don't apply, that the parole revocation
16 situation not becoming moot, we limited Sibron to say what
17 it said, the legal consequences, and said that some of the
18 other consequences that you're talking about did not
19 prevent it from becoming moot. You really -- we must
20 modify or abandon Lane v. Williams for you to prevail,
21 must we not?

22 MR. SIMON: Certainly not abandon, Mr. Chief
23 Justice.

24 QUESTION: But considerably cut back on it.

25 MR. SIMON: I'm not even sure of that, Mr. Chief

1 Justice. Lane is distinguishable on numerous grounds.
2 The prisoners there neither challenged their parole
3 revocations nor sought relief, nor put the consequences of
4 those revocations at issue by seeking expungement of their
5 records.

6 The target in Lane was the guilty plea way back
7 when, not the parole revocation. They were seeking relief
8 from what they contended to be an involuntary guilty plea.
9 If --

10 QUESTION: But didn't we say in Lane that
11 consequences -- we're talking about whether something
12 becomes moot. The consequences that didn't have the same
13 effect as statutory consequences would not be regarded as
14 keeping a case from being moot.

15 MR. SIMON: Correct, Your Honor. However,
16 things have changed since Lane.

17 QUESTION: What has changed?

18 MR. SIMON: Well, first of all the Court's
19 doctrine on that has changed, because in *Evitts* the Court
20 added --

21 QUESTION: That was a footnote in -- on a point
22 that wasn't even argued.

23 MR. SIMON: Well, Your Honor, I believe -- well
24 now, of course, Your Honor, I wouldn't know whether it was
25 argued. The Court would know that.

1 QUESTION: Well, you can tell whether -- just
2 from the way it's put in a footnote you can tell it wasn't
3 argued.

4 MR. SIMON: Your Honor, the material that is
5 most damaging to my client in Lane is also in a footnote.

6 The question is what the Court held in Lane and
7 in Evitts, rather than the typography of where the points
8 appeared and in Lane, the question that my client is
9 asking the Court to decide, this wasn't before the Court,
10 because in Lane the prisoners did not argue that the State
11 of Illinois had violated their Federal constitutional
12 rights as explained in Morrissey and Gagnon. The target
13 was just different, Your Honor.

14 I know the language is there, but not only were
15 the facts different in Lane and the procedural posture was
16 different, but Lane predated Evitts' addition of sentence
17 enhancement and testimonial impeachment to the list of
18 collateral consequences and, furthermore, one of the
19 things the Court relied on in Lane, as far as the reader
20 can tell, is the speculative nature of what was going to
21 happen.

22 And it's my position, Your Honor, that the
23 consequences of that, of a parole revocation, especially a
24 serious one like this, one sex offense, one weapons
25 offense, one drug offense, the consequences of these are

1 far more powerful --

2 QUESTION: Well, are you saying then that
3 whether or not a case has become moot may depend upon the
4 seriousness of the charges in the parole revocation?

5 MR. SIMON: Only if the Court chooses to apply
6 Sibron to parole revocations, Your Honor. If the Court
7 goes on a case-by-case basis and just says, well, in this
8 case it's forcible rape, armed criminal action, and
9 possession of crack cocaine, well, we're going to hold
10 that it's not moot, if the Court feels that that would be
11 unmanageable because courts would have to decide it on a
12 case-by-case basis, the Court could apply the Sibron
13 presumption.

14 My client wins either way because of the grossly
15 stigmatic characteristics of the felonies that he's been
16 found guilty of without a trial.

17 QUESTION: Well, Mr. Simon, as I understand it,
18 you're concerned about the stigma as it would apply at the
19 point of a subsequent parole revocation.

20 I would suppose that the stigma that you refer
21 to would be far more powerful at the point of a subsequent
22 decision to parole in the first place, and yet that does
23 not seem to be your concern.

24 Why does the stigma become greater when he has
25 been paroled and the question is, will parole be revoked,

1 than it was, or seems to be on your calculus, at the point
2 at which he would be subject to parole?

3 MR. SIMON: Your Honor, we have been a little
4 more soft-spoken about the parole consequences per se, but
5 we have never abandoned them, and they --

6 QUESTION: Did you argue them in the -- I
7 thought your argument on the circuit was that the adverse
8 consequences that you're concerned about are adverse
9 consequences at the point of a later parole revocation.
10 Was I -- am I wrong about that?

11 MR. SIMON: I -- Your Honor, I am not sure about
12 where the focus of it was, except that in the Eighth
13 Circuit the focus was on the parole consequences as -- and
14 to the exclusion, I will concede, of later consequences
15 such as sentence enhancement.

16 QUESTION: Let me ask you a different question,
17 if I may. It goes back to what Justice Breyer began with.

18 I take it you accept the fact that at a later
19 parole revocation hearing, at least, you could indeed
20 argue and present evidence to the effect that the
21 underlying conduct that was assumed in this revocation in
22 fact didn't take place.

23 MR. SIMON: Yes.

24 QUESTION: You could be heard on that.

25 MR. SIMON: Yes, Your Honor.

1 QUESTION: Is it also the case -- do you assume
2 that you could also make this argument: you may not
3 consider the fact of the earlier parole revocation as such
4 independently of the underlying conduct, because I was
5 doing my best, I had done my best to litigate that by
6 means of habeas at the time I was released, and therefore
7 the habeas issue became moot and I could never go to
8 judgment, so therefore you shall not consider, you must
9 not consider the parole revocation as such.

10 That argument would be open to you, and --
11 wouldn't it, and wouldn't it be successful?

12 MR. SIMON: Your Honor, if I were representing
13 Mr. Spencer on that hypothetical case I would certainly
14 make the argument that you're suggesting, Justice Souter.

15 However, I think that Occam's razor would tell
16 us that we should recognize collateral consequences before
17 we require counsel or particularly the pro se parole
18 candidate to make an argument that intricate, and I agree
19 that it is an intricate argument that a resourceful
20 counsel who is sitting here with us today would make.

21 QUESTION: Mr. Simon, may I just clarify one
22 thing? I thought that you were making the point in
23 connection with your client that it wasn't that they'd let
24 him out at parole and then it would only be -- the
25 question would be to put him back.

1 I thought you were talking about the reduction
2 of his chances now to be paroled when you called our
3 attention to the guideline in Missouri that says, will
4 they let him out now on parole when he's due? Not if
5 there appears -- there does not appear to be a reasonable
6 probability that he would live and remain at liberty
7 without violating the law, so I thought you were talking
8 about the reduction of his chances of being paroled.

9 MR. SIMON: Justice Ginsburg, the guideline that
10 you're quoting is from the Missouri sentencing guidelines
11 rather than their parole guidelines.

12 We acknowledge that it's discretionary with the
13 board how much weight the board should give to this parole
14 revocation in the board's decision, but I believe that
15 what the Court was just quoting was a document for the use
16 of Missouri courts in passing sentences.

17 QUESTION: It says -- can we take the case,
18 then, that there's not a single statute which attaches
19 adverse consequences to parole revocation in and of
20 itself.

21 MR. SIMON: No, Your Honor, we can't --

22 QUESTION: Or am I wrong about that?

23 MR. SIMON: We can't take that because of the
24 15-year window under the Federal Sentencing Guidelines.

25 QUESTION: No, there's -- I'm sorry. Is --

1 that's what I was wondering. There's something in the
2 Federal Sentencing Guidelines that says parole revocation
3 itself makes a difference?

4 QUESTION: In and of itself.

5 MR. SIMON: Well, it's -- I guess it depends on
6 what we mean by in and of itself.

7 QUESTION: No --

8 MR. SIMON: Consequences.

9 QUESTION: What I mean by this is the following,
10 and I think maybe Justice Kennedy means the same. If you
11 have a prior conviction and then you come up for
12 sentencing again, that's it, you know. You get a bump up.
13 You go into another column, or you get an -- that -- all
14 that the judge will look to is, is there another
15 conviction? I mean, that's basically the rule.

16 MR. SIMON: You can't attack it anyway?

17 QUESTION: Well, I don't know. That's why I
18 hesitated, because there may be certain things you could
19 attack.

20 MR. SIMON: No counsel, for example.

21 QUESTION: Yes. Yes, that's right, exactly.

22 But now, parole revocation I thought was
23 different. That's why I started with this, that there is
24 nothing that the parole revocation in and of itself gives
25 you a bump up for.

1 Rather, a judge would look at it and say, hmm,
2 his parole's been revoked. I wonder -- that doesn't look
3 good to me. I wonder what that's for, and then the
4 counsel would argue about it, and they'd say, you know, it
5 wasn't -- et cetera.

6 You see -- I thought -- but I wasn't certain I'm
7 right, and that's why I started out with this.

8 MR. SIMON: Well, Justice Breyer, for me to
9 advise you on the kinds of --

10 QUESTION: No, no.

11 MR. SIMON: -- Sentencing Guidelines --

12 QUESTION: You've read it recently --

13 MR. SIMON: -- is like bringing coals to
14 Newcastle.

15 QUESTION: You've read it recently with this in
16 mind, and so I raised it because I fear I could be
17 overlooking something, which is why I raised it.

18 MR. SIMON: Your Honor, the big picture in
19 respect to the Sentencing Guidelines is that before the
20 Sentencing Guidelines were authorized and adopted a
21 Federal sentencing court had virtually unbridled
22 discretion. 5 years to life could mean anything in
23 between.

24 But under the guidelines, the amount of
25 discretion, the scope of the sentencing judge's discretion

1 has been cabined, and one of the factors that goes into
2 that at various points is the 15-year window, concerning
3 which it does definitely have an effect and there's no
4 wriggling out of it.

5 QUESTION: 15-year window for what?

6 MR. SIMON: For a previous incarceration,
7 Justice O'Connor.

8 QUESTION: For prior offenses.

9 MR. SIMON: Yes, Your Honor.

10 QUESTION: Not parole revocation as such --

11 MR. SIMON: Not --

12 QUESTION: -- for prior offenses.

13 MR. SIMON: Not as such, Your Honor, but the
14 parole revocation makes a difference in the 15-year
15 window.

16 But the big picture, members of the court, is
17 that the Sentencing Guidelines have narrowed that window
18 of discretion. It's been a sea change in criminal
19 sentencing in the Federal courts, and the parole
20 revocations --

21 QUESTION: These all assume that he's going to
22 commit another crime and be judged again or be up for
23 parole again. Do we have to assume that?

24 MR. SIMON: No, Your Honor, because of the
25 other -- because of the other factors. When -- this does

1 not -- this argument for collateral consequences, whether
2 as applied to parole revocations or criminal convictions,
3 does not assume that the person is going to go out and
4 commit another crime.

5 Everything, all of the factors that the Court
6 has relied on in Carafas, in Evitts, wherever the Court
7 has talked about collateral consequences, there is some
8 intervening act, some intervening decision that the person
9 burdened by the collateral consequences must make.

10 One thing that everyone agrees on as a
11 collateral consequence is jury service. Whether a person
12 is kept from serving on a jury because he or she is a
13 convicted felon is -- depends on whether they're called
14 for jury duty, whether they come up with some excuse in
15 advance, whether they want to serve on the jury. That
16 depends on intervening choices. The right to vote depends
17 on intervening choices.

18 QUESTION: Yes, but those are -- I'm willing to
19 acknowledge that people have those choices. I'm not
20 willing to acknowledge that people have a choice whether
21 to commit a crime or not.

22 I -- it seems to me rather weird to say, oh, if
23 I commit another crime I'm going to be subject to these
24 adverse consequences. It seems to me the proper response
25 to that is, don't commit another crime.

1 MR. SIMON: Agreed, Your Honor, and there's no
2 way that I'm arguing that anyone should commit crimes.
3 However -- however, Your Honor, the same argument would
4 cut against other guarantees of the rights of the accused.

5 It's always -- when -- it would -- there would
6 always be an answer to a criminal defendant who seeks to
7 overturn his or her conviction by saying, well, you
8 shouldn't have committed that crime. You wouldn't have a
9 problem of ineffective assistance of counsel if you hadn't
10 committed the crime.

11 QUESTION: I'm not talking about that. That's
12 water over the dam. If the crime's been committed we're
13 talking about whether you were tried fairly, but you're
14 talking about, oh, if I -- I'm going to be deprived of,
15 you know, something if I should commit another crime, and
16 I'm not willing to accept the hypothesis. You should not
17 commit another crime.

18 QUESTION: May I ask two questions?

19 MR. SIMON: Yes, Justice.

20 QUESTION: First, isn't -- didn't -- this man
21 actually did commit another crime, didn't he?

22 MR. SIMON: He committed a separate crime that
23 is, we would submit, only marginally relevant to what's
24 going on here.

25 QUESTION: Oh, okay.

1 MR. SIMON: It was -- it was attempted stealing,
2 nothing to compare with the serious sexual, violent
3 weapons, drugs felonies that the State has found him
4 guilty of without a trial.

5 QUESTION: Let me ask my second question, then.
6 In the earlier Illinois case the -- conceivably if -- it
7 would not have been moot if they had asked for another --
8 wanted to replead and stand trial.

9 Now, supposing in this case the State takes the
10 position well, we'll admit the procedure was deficient but
11 we do want -- since he wants to get it off the record we
12 do want to have a hearing on the merits of the charges.
13 Would that be possible?

14 MR. SIMON: I shake hands with Mr. Layton and we
15 go home. We have our hearing.

16 QUESTION: You'd have -- but is that conceivable
17 in the way this thing might develop?

18 MR. SIMON: Theoretically conceivable, Your
19 Honor.

20 QUESTION: But under your view what will happen
21 if you win? That's what I --

22 MR. SIMON: Oh, the relief we would ask for,
23 Your Honor, is a remand to the Eighth Circuit for -- with
24 instructions to remand to the district court to allow the
25 respondents and the petitioner to litigate the merits of

1 his claims.

2 QUESTION: To say that it's not moot.

3 MR. SIMON: Yes, Your Honor.

4 QUESTION: Do you -- you said the Sentencing
5 Guidelines regime is new. Do you put in part of the
6 different picture in distinguishing Lane Heck and
7 Balisok, which wasn't clear what the 1983 situation was?

8 In other words, is there a way -- 1983 is not
9 available.

10 MR. SIMON: Mm-hmm.

11 QUESTION: Is there something other than habeas
12 that would enable you to expunge what you say is this
13 unjust blot on the record?

14 MR. SIMON: Not that I'm aware of, Your Honor.
15 My client exhausted his State remedies, as he was required
16 to under Preiser v. Rodriguez. Then he filed his habeas
17 corpus action.

18 He can't proceed with a 1983 until his habeas
19 corpus action has been not only litigated but victoriously
20 litigated under Heck and Edwards. At least as I read
21 the --

22 QUESTION: There's no other procedure in
23 Missouri that could be used to expunge this, to get a
24 hearing and to expunge it?

25 1983 is a Federal remedy, but no State remedy at

1 all to question a parole revocation that you say was
2 without due process?

3 MR. SIMON: I believe that his appropriate
4 remedy was -- in the State courts was a State habeas
5 petition. He filed successive petitions in the three
6 levels of Missouri courts and lost and then went to
7 Federal court, and Your Honor, I -- if there is another
8 procedure, first of all I'm not aware of it and second, I
9 believe that my friends here from the State would argue
10 that it was not appropriate and that it was a frivolous
11 inmate filing.

12 So it -- Heck -- but to go back to your point,
13 Justice Ginsburg, Heck and Edwards are very important to
14 this, because it means that if my client loses on the
15 mootness point and the court, the Federal district court
16 cannot address the merits of this, then he's boxed out of
17 any Federal remedy at all. He is simply stuck with this
18 unconstitutional parole violation that brands him as a
19 forcible rapist.

20 QUESTION: Well, that was the case for at least
21 a century and a half, wasn't it? I mean, you speak as
22 though it is unthinkable that a prisoner should not have a
23 hearing in Federal court on alleged constitutional
24 violation and State proceedings, but our use of habeas
25 corpus for that on a regular basis is relatively recent.

1 MR. SIMON: Agreed, Your Honor. The question is
2 whether this Court and Congress, as the two key
3 decisionmakers in this area, want that result to happen,
4 and Congress -- Congress, as we all know, has recently
5 revisited habeas -- Federal habeas corpus at the -- almost
6 simultaneously they revisited 1983 in PILRA, and in -- the
7 Congress considered these things very seriously.

8 They considered them after the majority of the
9 circuits, eight circuits by my count, had held that claims
10 like my client's were not moot, and they didn't amend
11 2254.

12 QUESTION: Well, they didn't amend it, but what
13 do you think in the congressional statutes dealing with
14 habeas corpus reflects a congressional desire that there
15 be a hearing in Federal court for every asserted violation
16 of the Federal Constitution in State criminal proceedings,
17 or parole proceedings?

18 MR. SIMON: Every? None, Your Honor.

19 QUESTION: Okay.

20 QUESTION: May I ask another question, sort of
21 on the question of mootness?

22 I gather you do not question the right of the
23 State to retain whatever evidence they have supporting the
24 conclusions that they led to in the parole violations.

25 MR. SIMON: No, Your Honor. I think they'd

1 better do that.

2 QUESTION: Okay. So if they have the right to
3 keep the evidence, what if they came in and said, well,
4 the parole violation doesn't mean anything in terms of, as
5 they basically argued, they said, therefore we'll take it
6 off the books but we're going to keep the information in
7 the file. That would satisfy you.

8 MR. SIMON: We go home, Your Honor.

9 QUESTION: I don't know why they don't do that
10 and let you go home, because that's all they need, it
11 seems to me.

12 MR. SIMON: Well, Your Honor, the respondents
13 are on the horns of a dilemma, because they're arguing
14 here that, oh, this is just a parole revocation. It
15 doesn't mean anything.

16 And yet when he comes up for sentencing there'll
17 be some assistant prosecuting attorney who's going to
18 be -- you know, arguing to the court that he's the worst
19 thing --

20 QUESTION: When he comes up for sentencing on
21 some new crime.

22 MR. SIMON: Or, Your Honor, when he is the
23 victim in an automobile accident and has to testify --

24 QUESTION: But that --

25 MR. SIMON: -- to get his medical expenses

1 paid.

2 QUESTION: That invokes Justice Souter's earlier
3 observation that at that point he says, look, this was an
4 improper revocation, you go from there, and then you said
5 that -- I think that's when you said it was -- Occam's
6 razor applied, because this is more --

7 MR. SIMON: Parsimonious.

8 QUESTION: -- I assume because this is more
9 complex. It seems to me it's much more -- is Occam's
10 razor a precedent we cited in this Court? I haven't seen
11 it recently.

12 But assuming that it is, it seems to me that
13 Justice Souter's solution addresses that. It's much more
14 simple to wait until there is a specific harm, and then
15 talk about it, as opposed to saying that 1983 is
16 available -- or, pardon me, that habeas corpus is
17 available for every parole revocation violation when the
18 custody is terminated.

19 MR. SIMON: Your Honor, I thought that the Court
20 had crossed that bridge in Sibron, and my question is, if
21 it -- if Sibron is right on that point, that we shoot it
22 out closer in time to the transactions and occurrences
23 involved in the case, which is what the respondents
24 normally want to do in collateral attacks, is litigate
25 things closer in time while the witnesses are still alive,

1 they're still around, the blood samples are fresh, what-
2 not, why doesn't it work when it cuts in the petitioner's
3 favor?

4 And as to the -- as to litigating it in a civil
5 trial, that -- see, they just multiply the number of
6 times --

7 QUESTION: Well, how would it -- you say it
8 would come up if he testified in an automobile accident.
9 Do the Missouri courts allow impeachment of a witness on
10 the ground of his parole was once revoked?

11 MR. SIMON: Your Honor, I believe that the two
12 sides have cited all of the Missouri cases on that, and
13 that the -- as -- they argue one side, we argue the other.
14 It's our position that as long as one asks the question
15 correctly, you can get that in, and we'd refer to the
16 Newman and Comstock cases on that.

17 QUESTION: May I ask one other question?

18 MR. SIMON: Please, Justice O'Connor.

19 QUESTION: I know your time is almost up, but
20 are you relying at all on any bad faith extension of time
21 in these habeas proceedings that caused the thing to
22 become possibly moot?

23 MR. SIMON: Well, first of all, Your Honor, in
24 no way are we relying -- are we asserting that this man is
25 entitled to relief on account of the delay, only that he's

1 entitled to a day in court.

2 We are concerned that this would send a
3 message --

4 QUESTION: But are you relying on the fact that
5 the district court acted improperly or in bad faith or
6 anything in extending the time after which he was
7 released?

8 MR. SIMON: No, Your Honor, but it does
9 illustrate the risk of leaving the lower court decision
10 intact.

11 Thank you. May I reserve --

12 QUESTION: Yes. Very well, Mr. Simon.

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

14 ORAL ARGUMENT OF JAMES R. LAYTON

15 ON BEHALF OF THE RESPONDENT

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

18 After Sibron, Lane, and the footnote in Evitts,
19 we might be able to divide collateral consequences that
20 are alleged to defeat mootness into three categories. The
21 first are those that are current civil disabilities, those
22 that led to the decision in Sibron -- can't vote, can't
23 serve on a jury, those kinds of things.

24 A second category are the ones that were
25 addressed in Lane, things that are discretionary that we

1 can't know now, for example, whether a past parole
2 revocation may have some impact on a future parole
3 request, or, to take that to its ultimate, where the Ninth
4 Circuit has said that perhaps a sufficient collateral
5 consequence is how this revocation might affect someone's
6 chances of employment in the future.

7 QUESTION: Mr. Layton, maybe I misremember
8 Sibron, but I thought, unlike the first case, Carafas, or
9 whatever, which dealt with only present disability, Sibron
10 did speak about future problems as a result of the
11 conviction, like being impeached as a witness.

12 MR. LAYTON: It did speak of those. However,
13 all of the precedents that Sibron cited to support the
14 premise that it could draw a line beyond which there is a
15 presumption against mootness were felony cases.

16 Every one of those is a case that involves
17 current civil disability, so Sibron is not clear as to
18 what it means in terms of what kind of disability today
19 would be sufficient, but the tenor of Sibron is there is a
20 conviction, and in our society we presume when there is a
21 conviction that there are some effects today, as opposed
22 to other kinds of things that may happen to someone as a
23 result of our judicial system.

24 A third category of alleged collateral
25 consequences are those that are contingent on some future

1 event, although they may not be discretionary after the
2 contingency occurs, and that leads us to the question of
3 the Federal Sentencing Guidelines that Justice Breyer was
4 asking about at the beginning of Mr. Simon's presentation,
5 and that are addressed for the first time in this respect
6 in the reply brief on the merits.

7 There is in the Federal Sentencing Guidelines a
8 provision that says, we will give points in criminal
9 history for all of the convictions where the incarceration
10 comes within the last 15 years, and by revoking
11 Mr. Spencer's parole, Mr. Spencer -- the time of Mr.
12 Spencer's conviction or his incarceration was extended.

13 So if Mr. Spencer is convicted of a crime
14 between April 16, 2007 and August 7, 2008, then the
15 Federal Guidelines would be affected by this parole
16 revocation, but not otherwise, and I think that shows the
17 difficult position that Mr. Spencer asks this Court to
18 take, that we assume that it is enough to defeat mootness
19 today that he may commit a crime during a relatively brief
20 period in the next century, and yet that's the position
21 that he's taken, that the Ninth Circuit has taken, that
22 that kind of sentence enhancement is sufficient.

23 The consequences Mr. Spencer alleges fall within
24 three general categories, that it may affect a future
25 parole decision -- what was addressed in Lane, and which

1 is an entirely discretionary decision under Missouri
2 law -- whether it would affect him at trial through
3 impeachment or perhaps a presentation of evidence under
4 Federal Rule of Evidence 413, or whether it would affect
5 his sentencing.

6 And then comes the question of the 1983 action,
7 which doesn't really fit in any of these categories of
8 collateral consequences, because his loss of a 1983 claim
9 is not the result of the parole revocation. It's not the
10 result of the hearing about which he complains.

11 It's the result of his failure to obtain a
12 successful decision in his habeas, or a State or a Federal
13 habeas, and I think there are three reasons why the Court
14 should resist the urge of Mr. Spencer to adopt the
15 position that a 1983 claim, or a loss of the 1983 claim
16 would be enough to defeat mootness.

17 The first is that it is too far removed from the
18 question at hand, which is the parole revocation. The
19 second is that --

20 QUESTION: I'm not sure I follow that, because
21 isn't it as a practical matter, given that when you're put
22 back in, parole is revoked, it's not for a very long time,
23 and almost in every case you couldn't get through the
24 whole process.

25 You have to go three tiers in the State and then

1 go into the Federal, so these things are bound to be moot,
2 aren't they, because even -- you're talking here about
3 district court delay, but that wouldn't be enough. You'd
4 have to go -- Lane didn't become moot till it was in this
5 Court, right?

6 MR. LAYTON: I think these things are bound to
7 become moot, and I think that the problem Mr. Spencer has
8 where he suggests that he is unusual somehow in losing a
9 1983 claim is -- well, let's present a hypothetical about
10 Mr. Spencer.

11 Let's suppose that his State remedies were not
12 exhausted until the day after he was reparaoled. He
13 wouldn't have a 1983 claim, not because of anything the
14 State had done, but because it just took a while for that
15 process to happen.

16 And yet he suggests here the Court ought to
17 announce a new rule that because of the timing of his
18 case, somehow, if we have a 1983 claim it will be lost,
19 the case is no longer moot.

20 Now, one of the things that that does is, it
21 would -- to adopt that would endorse the position that
22 Mr. Spencer can come before this Court and raise that
23 issue for the first time.

24 In his brief he wonders how the Eighth Circuit,
25 with its own precedent of Leonard v. Nix, could have

1 reached the decision that it did, given the -- a loss of a
2 1983 cause of action.

3 Well, the reason is because he never raised the
4 question of a 1983 cause of action in the Eighth Circuit,
5 and so for this Court to adopt that would be to endorse
6 the premise that all of these collateral consequences save
7 one, which were raised for the first time in this Court --
8 in fact, for the first time generally in the reply to the
9 cert petition -- that that's the way that someone should
10 operate. You can do these things late.

11 I think the third reason why the Court should
12 not adopt the premise that a 198 -- loss of a 1983 cause
13 of action is sufficient to prevent mootness is that that
14 would in effect move the Sibron presumption from just
15 covering habeas petitions that challenge convictions to
16 covering essentially all habeas petitions, because what
17 habeas petitioner, if the Court were to so rule, is going
18 to resist the urge to say, oh, I have a 1983 cause of
19 action, and so, judge, you can't dismiss my case.

20 QUESTION: Let me ask you something, Mr. Layton.
21 Is there any other procedure in Missouri whereby the
22 prisoner could get some kind of declaratory judgment or
23 any other relief finding that he was denied any hearing on
24 these charges?

25 MR. LAYTON: Perhaps not, Justice O'Connor. The

1 appropriate method would have been through a petition for
2 a writ of habeas corpus, which he pursued.

3 It may be possible for him to enter into, or
4 attempt a petition for a writ of mandamus, or a
5 declaratory judgment action, but we know of no instance in
6 which a person in his situation has attempted that.

7 QUESTION: So he just can't get it litigated.

8 MR. LAYTON: He cannot get it litigated in the
9 context of this case.

10 QUESTION: Well --

11 QUESTION: And does that mean, do you think,
12 that prison authorities would be essentially not
13 constrained about taking arbitrary action against a
14 prisoner near the end of the prison term because the whole
15 thing's going to become moot, or in connection with any
16 parole revocation because it's likely to become moot?

17 MR. LAYTON: No. The --

18 QUESTION: What are the constraints, if you're
19 right, and we have some bright line rule here?

20 MR. LAYTON: Section 1983 provides a constraint.
21 It just doesn't --

22 QUESTION: Well, but he's going to lose any
23 right to recover in 1983 because he can't get a successful
24 habeas conclusion.

25 MR. LAYTON: Well, he loses his 1983 claim.

1 QUESTION: Yes.

2 MR. LAYTON: But if the State had a policy or
3 program or practice of doing what Your Honor says, then he
4 would -- could have a 1983 claim to stop that practice,
5 not to question his own determination, but to stop that
6 practice, and he would have an incentive to do that, since
7 he's already incarcerated again, and although he's been
8 given a new parole date on his new sentence, he has yet to
9 be paroled, and so he could do that.

10 QUESTION: Mr. Layton, what about the State
11 challenges on State habeas? Is it possible to tell from
12 the dispositions of those cases whether the Missouri
13 courts passed on the merits of his claim?

14 MR. LAYTON: In each instance the petition was
15 denied without explanation, and so it is impossible to do
16 more than assume that they were ruling on the merits, with
17 the possible exception of the intermediate court, where he
18 used the wrong writ, although the Missouri practice is,
19 even when a lawyer presents the wrong writ, is to simply
20 assume that the lawyer intended a different writ.

21 QUESTION: Is it possible -- is it typical in a
22 Missouri habeas proceeding if the -- say the habeas court
23 expressed a view on the merits, to simply deny it, rather
24 than say it's -- write it out?

25 MR. LAYTON: It is very unusual in Missouri

1 practice for the denial of any writ to come with an
2 opinion. In fact, I have yet to see that in my own
3 experience.

4 QUESTION: May I ask a -- probably kind of a
5 stupid question, I must admit, but you're arguing that
6 this -- the harm to him is so trivial that the case is
7 moot. I suppose the benefit to the State must be fairly
8 minimal also.

9 MR. LAYTON: I don't know that that is a stupid
10 question, because it's something that I've considered
11 carefully.

12 In Pennsylvania v. Mims, where the question
13 before this Court was also mootness, but mootness where
14 the State wanted to continue litigating the case, the
15 Court said that it was -- well, the -- Justice Marshall in
16 a sense said it was barely not moot because the State had
17 an interest in some future sentencing.

18 Here we aren't even to that point. It's hard to
19 imagine what great incentive there is going to be for the
20 parole board if Mr. Spencer is now before the board and
21 has been told the board is to give him a new hearing. Why
22 does the board care whether they give him a new hearing or
23 not at this point? He's already served on his revocation.

24 QUESTION: And if the problem arises in a future
25 proceeding you -- everybody agrees you can save the

1 evidence and save -- just as you save charges that are
2 made against people that are never disposed of. You keep
3 them in the file so you know what's -- what accusations
4 have been made.

5 I mean, I -- it just doesn't seem to me the
6 world turns on the outcome of this case, and if you --
7 even if you should lose, it seems to me the cost to the
8 State is pretty minimal. You're just say whenever one of
9 these people file these out of -- you know, these old
10 cases, we'll just say, okay, we'll expunge the record,
11 we'll keep the -- but we're going to keep the evidence.

12 MR. LAYTON: Well, I think that that is --

13 QUESTION: That doesn't seem to me that would
14 hurt you very much.

15 MR. LAYTON: I think that would be true if all
16 cases were like Mr. Spencer's, but of course, if this
17 Court announces a rule that extends the breadth of
18 collateral consequences, then we will be litigating more
19 cases further in the district courts and the courts of
20 appeals, and that is our difficulty here, is not so much
21 what our disagreement is with Mr. Spencer, as where we
22 would be if this Court announced a different rule.

23 In fact, I doubt that with Mr. Spencer the --
24 this would have any impact at all. It's notable that
25 Mr. Spencer at no point through the process of the parole

1 hearings denied possession of cocaine, and twice before,
2 since the time he'd first left prison, he'd been found
3 with cocaine, and so it's unlikely that he would -- his
4 parole revocation would be any different even if he were
5 limited --

6 QUESTION: But there was a very serious charge
7 there of rape, which he vehemently denied.

8 MR. LAYTON: Yes. Yes, he did deny that. He --
9 at the original interview he admitted to consensual sex,
10 but denied that it was rape. He admitted to pushing the
11 woman down, but denied it was rape.

12 QUESTION: The problem that I have is that --
13 let's take the worst case. Let's say that parole
14 revocation is based on a confession that the defendant
15 made because the prison guard put him on the rack.

16 Even so, you say that doesn't matter. He has
17 his chance to go to the State court. They just denied it
18 without giving a reason. His time ran out while he was on
19 the Federal side, so too bad, this process that so
20 severely violated due process it's a wash. He has no
21 chance to be vindicated.

22 MR. LAYTON: That is the result of the Court's
23 holding in Heck v. Humphrey. Not the result of the
24 holding here, but in Heck v. Humphrey.

25 Because as I said before, Mr. Spencer would be

1 in the same situation under Heck v. Humphrey if he
2 couldn't complete his State remedies -- if he couldn't
3 complete his State remedies by the time he filed a Federal
4 habeas, then he couldn't assert a cause of action in the
5 hypothetical that Your Honor poses regardless of how the
6 Court rules here, so there would still be people in that
7 situation, unable to obtain a Federal forum in which to
8 litigate their claim.

9 QUESTION: So one possible thing would have been
10 in your view to say it's moot -- to bring this you have to
11 be in custody.

12 MR. LAYTON: Yes.

13 QUESTION: It's a -- all right. So we're only
14 talking about the cases where the prisoner was in custody
15 when he brings it but he's released before he's finished.
16 So in those cases it would be rational to do one of two
17 things. You could say, the habeas is over. He's no
18 longer in custody. But if he thinks he was hurt, he could
19 bring a 1983 action.

20 Or alternatively you could say, well, you don't
21 have to -- you can't bring a 1983 action, but -- if you're
22 hurt -- even if you're hurt, but you can keep pursuing the
23 one you started.

24 MR. LAYTON: Those are both logical, but the
25 third --

1 QUESTION: But now where we are is, if we agree
2 with you here we are saying you can't do either.

3 MR. LAYTON: That's right.

4 QUESTION: All right. Now --

5 MR. LAYTON: I think that's --

6 QUESTION: Now if -- and starting afresh --
7 let's start absolutely afresh, which is pretty close to
8 where I am.

9 I read the statute, and it says that in a habeas
10 case you must be in custody, and then you can ask for such
11 relief as law and justice require.

12 MR. LAYTON: Yes.

13 QUESTION: Is that right?

14 MR. LAYTON: Yes.

15 QUESTION: All right. So now we know at least
16 in some instances he doesn't really have to be in custody.
17 He just has to have been in custody when he -- that's
18 clear.

19 MR. LAYTON: That's the way that the statute --

20 QUESTION: All right. So now he says how could
21 it be moot under the Constitution of the United States,
22 because I was in custody. That's good enough to start
23 this thing, and I would like such relief as law and
24 justice require.

25 Namely, in my case, law and justice require a

1 hearing, after which there will be an expunging of the
2 record. That's what he wants. That's the relief.

3 MR. LAYTON: But the --

4 QUESTION: I mean, that's what he's asking for.
5 He's asking for that relief. He says of course it's not
6 moot. I haven't got the relief I want. That's the relief
7 I want.

8 MR. LAYTON: But to say --

9 QUESTION: And all we're debating about is
10 whether he should want it. He says that's up to me.

11 MR. LAYTON: The same --

12 QUESTION: Or, unless you say -- there's one
13 other little part to this, because I -- you'll say --
14 maybe you could say, well, the relief he wants under the
15 circumstances is outside the statute.

16 MR. LAYTON: I believe it is. I -- the same
17 kind of situation --

18 QUESTION: Oh, I didn't mean for you to jump
19 there yet --

20 MR. LAYTON: Okay --

21 QUESTION: -- because I was saying -- two
22 parts -- one is, why would the Constitution stop him from
23 getting the relief he wants? He hasn't got it.

24 MR. LAYTON: Well, I don't know that the --

25 QUESTION: Then the statutory part.

1 MR. LAYTON: I don't know that the Constitution
2 does stop him from getting the relief he wants. The
3 question here is not his constitutional right but his
4 statutory right, either under the habeas statute or 1983,
5 and so this Court has interpreted 1983 not to give relief
6 to someone in this man's situation, and so it's not a
7 constitutional right --

8 QUESTION: What we're doing here, and it's
9 really -- mootness is an odd word to use. We're saying
10 that given the change in circumstance -- maybe it's the
11 right word, but given the change in circumstance, the
12 relief he wants is outside the phrase I quoted in the
13 statute.

14 MR. LAYTON: Correct.

15 QUESTION: It couldn't be relief that law and
16 justice requires, and the reason it couldn't be is because
17 too little turns on it.

18 MR. LAYTON: Yes.

19 QUESTION: That's your argument.

20 QUESTION: Or you could say that he's no longer
21 in custody.

22 MR. LAYTON: Yes, you could take that approach.

23 QUESTION: No -- well, we -- how can we say that
24 if, in fact, in other cases we've said that a person who
25 is no longer in custody can bring it?

1 MR. LAYTON: I think that Justice Breyer
2 presents the problem.

3 QUESTION: Yes. Yes, if one goes back to the --
4 if one wants to analyze it by the statute, according to
5 Justice Breyer, one would never have decided Carafas or
6 Sibron the way they did.

7 MR. LAYTON: It's certainly possible to go to
8 where Justice Thomas led in, I believe it's the Heck
9 decision, and not have any of these problems, but we
10 aren't there today, and today we're in the presence of the
11 Lane decision that says that when the future consequences
12 are discretionary, when they're speculative, when they
13 require certain intervening steps before there's some kind
14 of relief, that we aren't going to recognize that the case
15 continues after custody in those situations.

16 So the Court doesn't have to go nearly that far
17 in order to reach the conclusion that it ought to reach
18 today.

19 QUESTION: Of course, in Lane we in effect said
20 that if he had -- they had asked for relief this man asked
21 for it would not have been moot.

22 MR. LAYTON: Well, I'm not sure of that. I
23 think that the Lane -- that at least the way I read the
24 decision the -- what you -- the Court was suggesting was
25 that they'd asked about the original conviction, and so --

1 QUESTION: They were asking for in effect an
2 enforcement of the plea, specific enforcement of the plea
3 bargain.

4 MR. LAYTON: Yes.

5 QUESTION: Which we --

6 MR. LAYTON: If -- if we treat the parole
7 revocation as the direct equivalent of a conviction, then
8 that's correct, but we haven't treated parole revocations
9 as the direct equivalent of convictions, and I think the
10 reasons have come out this afternoon, that they don't come
11 accompanied by the same kind of consequences, at least
12 under Missouri law.

13 Now, it may be that we would be in a different
14 situation if we were in a State such as, I believe New
15 Hampshire, where after you've been revoked once, you never
16 can get parole again, but we aren't in that situation.

17 All of these kind of disabilities or
18 consequences that we're talking about are remote and
19 contingent.

20 QUESTION: Mr. Layton, the most recent
21 expression of this Court on this mootness is a case called
22 Minnesota v. Dickerson, and I was surprised that neither
23 brief cited that.

24 That seems to favor the petitioner here. I --
25 do you know what -- it's at 508 U.S. at page 371,

1 footnote 2.

2 MR. LAYTON: Well --

3 QUESTION: It's that long footnote.

4 MR. LAYTON: I know the footnote. I will
5 confess that I have studied it, but I am not at the moment
6 recalling exactly why I didn't think that I would read it
7 in the petitioner's favor.

8 It certainly does follow along from Sibron,
9 Lane, and Evitts, but I don't think would read to -- could
10 be read fairly to hold in petitioner's favor here.

11 QUESTION: It wasn't -- it was a case where
12 there was a diversionary sentencing statute so that there
13 was no conviction on the record.

14 MR. LAYTON: That's right, and there was a
15 reference in the case to collateral legal consequences,
16 and they were of the sort that are contingent in my three-
17 part classification that is --

18 QUESTION: Yes, because the original criminal
19 charges, as I understand that case, were dismissed.

20 MR. LAYTON: I believe that that is right,
21 although the dismissal itself I think is at issue there.
22 I don't think that it comes up under habeas, and so it
23 doesn't incur the habeas problems that we have here,
24 but --

25 QUESTION: And that was a case I think in which

1 it was the petitioner that was seeking to have it
2 dismissed as moot, rather than the State.

3 MR. LAYTON: That may be, plus the Minnesota
4 statute said that a conviction after a successful
5 probation, although not a conviction for future purposes,
6 can be used in calculating a criminal history category
7 under Minnesota law, but there's nothing in that decision
8 to suggest that the same would be true even under
9 Minnesota law for a parole revocation.

10 Again, it addresses a conviction and not a
11 parole revocation, and that becomes a critical distinction
12 as long as we attach to convictions certain mandatory
13 civil disabilities or consequences.

14 If there are no further questions, I thank the
15 Court.

16 QUESTION: Thank you, Mr. Layton.

17 Mr. Simon, you have 4 minutes remaining.

18 REBUTTAL ARGUMENT OF JOHN W. SIMON

19 ON BEHALF OF THE PETITIONER

20 MR. SIMON: Thank you, Your Honor.

21 First, I would like to say that the petitioner
22 agrees with the respondent that the question here is
23 statutory and not constitutional, that it's well-
24 established in the decisions of this Court, acquiesced in
25 by years of congressional revision, coupled with inaction,

1 that a person must be in custody when he or she files a
2 petition but that once that is filed, the court may reach
3 the merits of that after they have been released or even
4 completely discharged.

5 In respect to the Minnesota decision, members of
6 the court, the petitioner owns that decision and did not
7 feel a need to cite it with specificity by virtue of a
8 reference I believe I made in the reply brief to the cases
9 relied on by the amici.

10 QUESTION: But you didn't cite it, so that
11 suggested to me you didn't think it was -- if it was in
12 your favor, that it was strongly in your favor.

13 MR. SIMON: I'm sorry if I didn't cite it
14 expressly, Your Honor, but we would own it.

15 Now, it would allow -- it referred to use of
16 adjudications in future proceedings. It was rather broad,
17 but we do see it as buttressing our position.

18 Now, with respect to the petitioner's denial of
19 his drug use, I would refer the Court to pages 89 and 90
20 of the joint appendix, paragraphs 33 and 34. These are
21 not written with great articulateness, but I interpret
22 these as denying the drug use and disagreeing with the
23 interviewing officer to the effect that the petitioner had
24 admitted the drug use.

25 So we have hearsay within hearsay from the

1 parole officer saying that the petitioner admitted the
2 drug use. Now --

3 QUESTION: You're not saying that wouldn't be
4 admissible in a revocation hearing, are you?

5 MR. SIMON: Mr. Chief Justice, hearsay is, of
6 course, admissible in parole revocation proceedings. We
7 don't deny it, but that illustrates the slender thread on
8 which this revocation hangs.

9 Now, the respondents have presented many
10 arguments about how this parole revocation isn't very
11 serious, how this parole revocation for forcible rape,
12 armed criminal action, and possession of crack cocaine
13 isn't very serious, and on some of them I have to agree
14 that they've scored on some of these points in respect to
15 this particular petitioner, and I'm not telling this Court
16 that every single reason why a criminal conviction remains
17 live after release applies to a parole revocation, at
18 least as to Randy Spencer.

19 But if one looks at the big picture, it is just
20 absolutely unrealistic, bordering on disingenuous, to say
21 that a parole revocation by the State of Missouri for
22 three serious felonies doesn't matter, that it doesn't
23 give the person affected by it a substantial stake, that
24 gives him the incentive to litigate it zealously.

25 In Missouri we like to ask questions on voir

1 dire, if there's any member of the panel that does not
2 have common sense. No one raises their hands, and so you
3 say, well, Judge Bandry is going to instruct you in a few
4 minutes, that you just need to apply your common sense in
5 this case.

6 I think that if the Court looks at the damage
7 that this does to this man's future in terms of
8 testimonial impeachment --

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Simon.

10 The case is submitted.

11 (Whereupon, at 1:50 p.m., the case in the above-
12 entitled matter was submitted.)

CERTIFICATION

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

RANDY G. SPENCER, Petitioner v. MIKE KEMNA, SUPERINTENDENT, WESTERN MISSOURI CORRECTIONAL CENTER
CASE NO: 96-7171

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

BY Don Mari Federico-----

(REPORTER)