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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. ROY LEE JOHNSON

CASE NO: 98-1696 e.1

PLACE: Washington, D.C.

DATE: Wednesday, December 8, 1999

PAGES: 1-45

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 UNITED STATES, :

4 Petitioner :

5 v. : No. 98-1696

6 ROY LEE JOHNSON :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, December 8, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor
15 General, Department of Justice, Washington, D.C.; on
16 behalf of the Petitioner.

17 KEVIN M. SCHAD, ESQ., Cincinnati, Ohio; on behalf of the
18 Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	BARBARA B. McDOWELL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	KEVIN M. SCHAD, ESQ.	
7	On behalf of the Respondent	15
8	REBUTTAL ARGUMENT OF	
9	BARBARA B. McDOWELL, ESQ.	
10	On behalf of the Petitioner	37
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 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 98-1696, The United States v. Roy Lee
5 Johnson.

6 Ms. McDowell.

7 ORAL ARGUMENT OF BARBARA B. McDOWELL

8 ON BEHALF OF THE PETITIONER

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

11 This case concerns when a Federal criminal
12 defendant's term of supervised release begins. The
13 unambiguous text of 18 U.S.C. 3624(e) provides the answer.
14 That section states that a defendant's term of supervised
15 release commences on the day he is released from
16 imprisonment.

17 It further states that a term of supervised
18 release does not run during any period in which the
19 defendant is imprisoned, except for a period of less than
20 30 days. Until a defendant is actually released from
21 prison, his supervised release does not begin. The
22 statute provides --

23 QUESTION: Suppose that you don't have the
24 situation which existed here, where he was wrongfully
25 convicted and serving a term on a wrongful conviction, but

1 suppose that just in violation of his rights the prison
2 keeps him in for 3 years after the -- his term of proper
3 conviction had actually expired. Do you think we'd be
4 obliged to have him serve his term of 3 years' supervised
5 release after those 3 years of wrongful imprisonment had
6 already occurred?

7 MS. McDOWELL: Yes, Your Honor. He would have
8 no remedy that's based on his supervised release term that
9 would be automatic.

10 QUESTION: Well --

11 MS. McDOWELL: He could, however, move under
12 section 3583 for reduction in his term of supervised
13 release.

14 QUESTION: Which would be discretionary, with
15 approval?

16 MS. McDOWELL: That would be discretionary, yes.

17 QUESTION: Well, I -- it doesn't seem to me this
18 ought to be discretionary.

19 MS. McDOWELL: That would --

20 QUESTION: Why can't we interpret the words,
21 does not run during any period in which the person is
22 imprisoned in connection with a conviction, why can't we
23 interpret that to mean reasonably, properly imprisoned in
24 connection with a conviction?

25 MS. McDOWELL: Well, that would still be

1 inconsistent with the earlier sentence in that same
2 provision that says the term of supervised release
3 commences on the day the person is released from
4 imprisonment. That seems to contemplate actual release,
5 not could have been, should have been, or would have been
6 released.

7 QUESTION: What is -- is there a statute that
8 governs the service of consecutive sentences?

9 MS. McDOWELL: Yes, there is. There's a statute
10 that provides that for administrative purposes all
11 sentences will be aggregated. That's section 3584, I
12 believe.

13 QUESTION: And all sentences shall be
14 aggregated, what does that mean?

15 MS. McDOWELL: That has the effect of, if one
16 sentence happens to be vacated defendant will
17 automatically receive credit against a subsequent
18 consecutive sentence.

19 QUESTION: Suppose the statute didn't read that,
20 and suppose that a person is serving consecutive sentences
21 under a provision either in the statute or in the judicial
22 sentence which says his time for the second conviction
23 shall not begin to run until the service of his time for
24 the first conviction has expired, all right, and then it
25 turns out that the first conviction was improper. He

1 served 5 years in prison wrongfully. You'd still put him
2 in for the next 5?

3 MS. McDOWELL: We would still require him to
4 serve a term of supervised release if there was still a
5 term of --

6 QUESTION: I'm not talking about supervised
7 release. I'm talking about a second conviction. He's
8 serving consecutive terms.

9 MS. McDOWELL: The courts --

10 QUESTION: The first term is invalidated.
11 They're both 5 years --

12 MS. McDOWELL: Uh-huh.

13 QUESTION: 5-year terms. The first term is
14 wrong. He shouldn't have been there on that first term.
15 He served 5 years.

16 MS. McDOWELL: Uh-huh.

17 QUESTION: And then you say, well, sorry for
18 that mistake, but here's the second term of 5 years. We
19 want you to serve that now.

20 MS. McDOWELL: There could conceivably be a due
21 process problem with that. The courts haven't addressed
22 that particular issue, perhaps because the United States
23 Government has this aggregation provision and States have
24 similar provisions as a result of statute, or court
25 decision.

1 The due process question has come up typically
2 in the context of whether a vacated State sentence has to
3 be credited against a Federal sentence still to be served,
4 or vice versa, and the courts have held there's no due
5 process problem in those circumstances because of the dual
6 sovereignty.

7 QUESTION: Right. Right.

8 MS. McDOWELL: This could conceivably be a
9 different situation.

10 QUESTION: But if it were the same sovereign
11 there might be a due process problem?

12 MS. McDOWELL: There could conceivably be.

13 QUESTION: Why might there not be a due process
14 problem where the second sentence is a sentence to
15 supervised release?

16 MS. McDOWELL: Because supervised release serves
17 different purposes than a term of imprisonment. It's
18 supposed to assist the defendant's transition into society
19 and to protect the community.

20 QUESTION: But you're not -- I mean, it may
21 serve different purposes, but you're not entitled to force
22 someone to undergo it except as punishment for a crime,
23 right?

24 MS. McDOWELL: That's true, but in this case, in
25 the case I conceive we're talking about, the defendant

1 still has a valid term of supervised release attached to a
2 valid conviction. We wouldn't, of course, insist that a
3 defendant --

4 QUESTION: Oh, but --

5 MS. McDOWELL: -- serve a term of supervised
6 release otherwise.

7 QUESTION: -- you say there may be a due process
8 problem in forcing him to serve the second conviction.
9 Why wouldn't there be a due process problem in forcing him
10 to serve the supervised release that is a punishment for
11 the second conviction? It may serve rehabilitative
12 purposes as well, but it's a punishment.

13 MS. McDOWELL: It may be --

14 QUESTION: And if there is a due process
15 problem, why shouldn't we strain to interpret this statute
16 in order to avoid the due process problem?

17 MS. McDOWELL: Well, the only conceivable due
18 process problem would be in the context of two terms of
19 imprisonment. We conceive that since the purposes of
20 supervised release are so different, and because they are
21 so much less intrusive on a defendant, and because a
22 defendant has an opportunity to get out of the term of
23 supervised release after 1 year, based on his behavior and
24 the interest of justice, that it's not the same situation.

25 QUESTION: At the discretion of the court.

1 MS. McDOWELL: At the discretion of the court.

2 QUESTION: That's very nice.

3 QUESTION: If a conviction were set aside, it
4 wouldn't just be the prison term that was set aside. It
5 would be the supervised release, too, would it not?

6 MS. McDOWELL: That's correct, Your Honor, but
7 in this case there are still valid convictions to which
8 the term of supervised release was attached.

9 QUESTION: Now, here, the supervised release was
10 ordered in connection with the drug offenses which --

11 MS. McDOWELL: That's correct.

12 QUESTION: -- were not the offenses, the gun-
13 related offense that was wrongfully imposed?

14 MS. McDOWELL: That's correct, Your Honor.
15 There were in fact two drug offenses, each of which
16 carried a mandatory term of supervised release of at least
17 3 years.

18 QUESTION: And what has happened to this -- to
19 Mr. Johnson since the Sixth Circuit decision? Has he been
20 on supervised release or not?

21 MS. McDOWELL: No. He had been on supervised
22 release under the district court's decision --

23 QUESTION: Uh-huh.

24 MS. McDOWELL: -- and served somewhat in excess
25 of 2 years on supervised release. He was then released

1 immediately --

2 QUESTION: And off --

3 MS. McDOWELL: -- upon the court of appeals
4 decision.

5 QUESTION: -- supervision, and the consequences
6 of a reversal here would be that he would go back on for a
7 period of --

8 MS. McDOWELL: That's correct. He would still
9 have approximately 9 months more to spend on supervised
10 release. He would, of course, have the opportunity to
11 move under section 3583(e) for a reduction or termination
12 of that term.

13 QUESTION: Would you oppose that motion?

14 MS. McDOWELL: Not knowing the particular
15 circumstances of this defendant --

16 QUESTION: I mean, this is Christmas time,
17 almost.

18 (Laughter.)

19 MS. McDOWELL: -- it's difficult to say. The
20 Government has in a number of cases involving similar
21 Bailey defendants not opposed a motion for early
22 termination.

23 The court of appeals relied on another section
24 of the same statute, section 3624(a), to hold that this
25 statute is ambiguous. We disagree. Section 3624(a) says

1 nothing about supervised release. Much less does it
2 suggest that a defendant is entitled to a remedy of a
3 credit against his term of supervised release if he ends
4 up spending more time in prison than in retrospect he
5 should have spent.

6 Indeed, section 3624(a), which states simply
7 that the Bureau of Prisons should release -- shall release
8 a prisoner at the expiration of his term of imprisonment,
9 is not even violated in this circumstance, where the
10 Bureau of Prisons releases the defendant on the very day
11 specified under the sentence imposed by the district
12 court.

13 QUESTION: What of the argument that you have to
14 give credit for even periods of liberty erroneously
15 granted, that that counts against the sentence if they let
16 you out by mistake, and then you get it all back, the time
17 that you were out counts as part of your sentence, and the
18 anomaly that you don't get credit for time wrongfully
19 served in prison?

20 MS. McDOWELL: It's questionable, Your Honor,
21 whether the doctrine that you're referring to, the common
22 law doctrine, has any continuing validity. As Judge
23 Posner noted in a 1994 opinion, it hasn't been applied to
24 a defendant's benefit in many years.

25 We would suggest that the clear language of

1 section 3624(e) supersedes the common law in this regard.
2 Also, this doctrine --

3 QUESTION: You could argue that that rule is
4 thoroughly in accord with the rule that you're arguing
5 for. That gives the Government, that deprives the
6 Government of incarceration time to which it is entitled,
7 just as the position you're arguing for deprives the
8 defendant of freedom time to which he's entitled, so maybe
9 there's a certain equity in that, I guess.

10 MS. McDOWELL: Well, the doctrine has been
11 applied only in circumstances where the Government is
12 negligent or at greater fault. Certainly in these
13 circumstances, where a defendant has been held under a
14 valid conviction that was correct under Sixth Circuit law
15 until Bailey, it's difficult to find any fault on the part
16 of the Government similar to those in the constructive
17 parole cases.

18 QUESTION: Do you agree with Justice Scalia's
19 comment that this statute has a punitive -- that
20 supervisory release is a form of punishment?

21 MS. McDOWELL: There may be punitive aspects to
22 it, Your Honor.

23 QUESTION: It's not entirely punitive.

24 MS. McDOWELL: It's principle purpose, as
25 conceived by Congress, was not punitive.

1 standard QUESTION: At least there is an element of
2 punishment here. this case, is the defendant work
3 regularly MS. McDOWELL: There may well be, yes. officer,
4 working QUESTION: And what is that element, simply the
5 fact that he is required to report periodically, or what-
6 not? monitor his performance on the job. This provides a
7 certain MS. McDOWELL: Your Honor, that's part of it.
8 That's not all that supervised release entails, however.
9 QUESTION: He's deprived of certain liberties
10 that ordinary citizens don't have, isn't that right?
11 MS. McDOWELL: Well, he's required, for example,
12 to maintain a job, to go to substance abuse counseling --
13 not a separate QUESTION: Right. defendant's sentence. It was
14 simply MS. McDOWELL: -- not to leave the district
15 without seeking permission from his probation officer or
16 the court --
17 QUESTION: Cannot carry firearms. to violate his
18 terms of MS. McDOWELL: That's correct. be the maximum
19 liability QUESTION: What's the -- what is the
20 rehabilitative aspect of it? I mean, part of the years.
21 Government's argument is that this is for his benefit to
22 ease his transition back into society. Is there anything
23 beyond what you have just described that helps him ease of
24 his way? that terms of imprisonment upon revocation of
25 supervised MS. McDOWELL: Yes. For example, one of the

1 standard conditions of supervised release, and one of
2 those imposed in this case, is the defendant work
3 regularly at gainful employment. The probation officer,
4 working with the defendant, will put him in touch with
5 potential employers, or with job placement agencies, and
6 will monitor his performance on the job. This provides a
7 certain amount of assistance and discipline to assist in
8 his rehabilitation.

9 Similarly, a condition --

10 QUESTION: It's a lot like parole, then?

11 MS. McDOWELL: It's quite similar, in this
12 aspect, to parole. Parole was different in that it was
13 not a separate term of a defendant's sentence. It was
14 simply served at the end of a term of imprisonment.
15 That's why this issue didn't come up during the parole
16 era.

17 QUESTION: If this defendant were to violate his
18 terms of supervised release, what would be the maximum
19 liability that he would have for that violation?

20 MS. McDOWELL: Conceivably, at least 4 years.
21 The period of -- to which a defendant can be sentenced to
22 imprisonment for a violation of supervised release is set
23 forth in the statute. It's been held by several courts of
24 appeals that terms of imprisonment upon revocation of
25 supervised release can run consecutively, even if the

1 terms of supervised release themselves run concurrently.

2 So in this case, since there was supervised
3 release imposed on the two drug counts, conceivably
4 Mr. Johnson could be subject to 4 years.

5 The Bureau of Prisons has, in fact, construed
6 the crediting statute, 3585, to give a defendant whose
7 supervised release has been revoked credit against his
8 subsequent sentence for any time that he erroneously spent
9 in prison previously.

10 If there are no further questions, I'll reserve
11 the remainder of my time.

12 QUESTION: Very well, Ms. McDowell.

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

14 ORAL ARGUMENT OF KEVIN M. SCHAD

15 ON BEHALF OF THE RESPONDENT

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

18 The respondent does not argue that it should --
19 that the respondent should have -- that the Government is
20 entitled to its pound of flesh in this case. The problem
21 with this case has always been that the Government has
22 always sought 3 pounds of flesh where it's only entitled
23 to 1.

24 If you look at the procedural history of this
25 case, the Government argued for two consecutive 924(c)

1 charges which were later overturned by the Sixth Circuit
2 en banc court.

3 The original sentence in this case was
4 171 months' imprisonment with the 3-year supervised
5 release. Upon the Bailey case we filed the 2255 motion
6 and were able to overturn the other conviction, the 924(c)
7 conviction in this case, but the Government has always
8 consistently sought in this particular case to obtain more
9 than which they are entitled to.

10 If I can address Justice O'Connor's question to
11 the United States with regards to the relief that the
12 United States is seeking in this case, the request for
13 relief in this case is somewhat vague in that the United
14 States doesn't address how it is entitled to a particular
15 kind of relief in this case.

16 If you take the United States' position that
17 supervised release began to run in May of 1996, then in
18 May of 1999 of this year, supervised release will have
19 ended whether or not he was actually on supervised release
20 or not.

21 There is no statute which says that the period
22 of supervised release is tolled for the time in which the
23 court of appeals case and the --

24 QUESTION: What is the date May 1996? I want to
25 be sure I follow you.

1 MR. SCHAD: In May of 1996 there was a bond
2 hearing and Judge Gilmore of the United States District
3 Court of the Eastern District of Michigan at that point
4 overturned the 924(c) conviction. He was released on that
5 date, May 2, 1996.

6 QUESTION: I see.

7 MR. SCHAD: And the Government's position,
8 United States' position has been that supervised release
9 began to run on that day, so if you take that starting
10 date and play that out for the entire 3 years, then even
11 now the United States is not entitled to any relief in
12 this case.

13 QUESTION: Well, why does the United States say
14 that he is not on supervised release now? How do we know
15 that he's not on supervised release?

16 MR. SCHAD: Well, in -- Justice Scalia, in fact
17 the Sixth Circuit did overturn the portion of his
18 supervised release in its decision of August of 1998, and
19 the decision of the Sixth Circuit was transmitted up to
20 the probation officer and in fact he has not been --

21 QUESTION: I see.

22 MR. SCHAD: The probation officer has not been
23 supervising him since August of 1998.

24 QUESTION: And there's nothing in the statute
25 that requires that suspension to be tolled, that requires

1 the supervised release time to be tolled by reason of that
2 suspension?

3 MR. SCHAD: That's correct, Justice Scalia, and
4 the Government, the United States did not seek to stay the
5 Sixth Circuit's decision pending this Court's decision, so
6 in fact, even if this Court were to decide that in cases
7 under 3624(e) the term of supervised release only begins
8 to run on the day they're actually released from prison,
9 we would argue that it wouldn't make a difference in this
10 particular defendant's case.

11 QUESTION: But it would until -- you said it ran
12 out in May 1999?

13 MR. SCHAD: That's correct. That's correct,
14 Justice Ginsburg.

15 QUESTION: So that under -- why do you -- I
16 mean, what are we arguing about? Isn't -- under 3583 the
17 unusual defendant who finds himself in your client's
18 situation has a remedy. He goes back to the district
19 court and he says, judge, I would like you to end the
20 supervised release so it's only a year long, and during
21 that year I would like there to be no conditions at all.
22 So -- and the judge has adequate power to do that, doesn't
23 he, so what's the problem?

24 QUESTION: And all judges are thoroughly
25 reasonable and will come to the right decision --

1 (Laughter.)

2 QUESTION: -- tendered towards the defendant,
3 right?

4 MR. SCHAD: Yes. To answer you question,
5 Justice --

6 QUESTION: It's possible not all judges are
7 thoroughly reasonable, I agree with that. What --

8 MR. SCHAD: To answer your question, Justice
9 Breyer --

10 QUESTION: Yes.

11 MR. SCHAD: -- even if there were no conditions
12 of supervised release for that term of the year that this
13 particular defendant would have to wait until supervised
14 release was then terminated, he still has the problem of
15 if he would commit another crime to the satisfaction of
16 the probation officer he then can be brought up for
17 supervised release revocation and be given the entire
18 3 years of supervised release at any time during that
19 1 year, so even --

20 QUESTION: All right, so he has a special --
21 that kind of special burden, and then let me ask you this
22 question. Suppose a person is convicted of a crime, A,
23 and he has two punishments, X months in prison and a
24 \$50,000 fine.

25 Now, suppose he's also convicted of crime B, and

1 he serves prison in crime B, and unfortunately that
2 conviction was erroneous, so it's reversed after he
3 receives some time. That's our basic situation. Not A,
4 but B was reversed.

5 All right. Does the Government now have to give
6 his money back for the fine on crime A?

7 MR. SCHAD: Well, Justice Breyer, in that
8 situation I don't know if crimes A and B are necessarily
9 related to each other.

10 QUESTION: No, they're not related at all.

11 MR. SCHAD: Okay. As a good defense lawyer I
12 would argue that they were entitled to a portion of the
13 fine back. I would --

14 QUESTION: So if he's fined solely on crime A,
15 which has nothing to do B, and it turns out that B was
16 erroneous, not A, he has to give back the money on crime
17 A?

18 MR. SCHAD: I do not believe --

19 QUESTION: The Government has to give it back?

20 MR. SCHAD: Yes. I do not believe that I could
21 find support for that under the law but certainly I
22 would --

23 QUESTION: All right. I agree with you. I
24 agree with you.

25 MR. SCHAD: Certainly I would make that

1 argument.

2 QUESTION: I agree with you, and I think it
3 would be --

4 (Laughter.)

5 QUESTION: All right. That being so, how does
6 supervised release for crime A differ from the fine?

7 MR. SCHAD: In supervised -- in the time
8 spent --

9 QUESTION: If you want to say, take the present
10 case, I mean, that's what I'm --

11 MR. SCHAD: Okay. In taking the present case
12 and applying it to those circumstances, we have a
13 situation where unless this particular defendant gets
14 credit off of his supervised release for the time that he
15 spent in prison, he has no basis to obtain relief for the
16 time that he had spent in prison.

17 QUESTION: You know, I -- you see, my question
18 is --

19 MR. SCHAD: I --

20 QUESTION: -- if it doesn't affect part 2 of the
21 punishment for the first crime, namely crime A, you know,
22 why does it affect part 2, where the only difference is
23 instead of a fine for crime A it's supervised release for
24 crime A?

25 MR. SCHAD: I do understand your question,

1 Justice Breyer, and I don't know that I have an adequate
2 answer for it.

3 QUESTION: Mr. Schad, if he's fined incorrectly
4 for crime B, can he get the money back?

5 MR. SCHAD: Yes. Yes, Justice Scalia.

6 QUESTION: If he's incarcerated incorrectly for
7 crime B, can he get the time back?

8 MR. SCHAD: No, Justice Scalia.

9 QUESTION: So it seems fair to give him the time
10 back by not putting him in for the additional 5 years on
11 crime A. That's a somewhat different situation, isn't it?

12 MR. SCHAD: That's correct, Justice Scalia.

13 QUESTION: The only way to give him the 5 years
14 out of his life back is not to have the incarcerated
15 release tolled against him.

16 MR. SCHAD: Yes, Justice Scalia, and as a matter
17 of fact there is no other way in this particular case,
18 returning to the facts of this particular defendant, there
19 is no other way to provide him with some relief for the
20 time that he has spent in prison. The --

21 QUESTION: But what of the Government's argument
22 that supervised release, although it may have a punitive
23 aspect, is primarily designed to have the person monitored
24 during his transition back into the community and, indeed,
25 I think the Government says the serious business of the

1 crime is not a factor in the term of supervised release,
2 but rather the characteristics of the defendant.

3 MR. SCHAD: Well, Justice Ginsburg, in fact,
4 when imposing a term of supervised release under the
5 guidelines, the court is to look at the severity of the
6 offense. There's classes of felonies that are -- there's
7 A, B, C, and D type class felonies, and depending upon the
8 severity of the felony, that in turn makes the minimum
9 supervised release term larger.

10 So in fact the sentence itself, or the crime
11 itself does have a bearing on supervised release, and
12 although the respondent would admit that there are some
13 rehabilitative aspects of supervised release, that doesn't
14 mean that the converse is not also true, in that
15 incarceration, although it's punitive in nature, does also
16 have aspects of rehabilitation.

17 In the Bureau of Prisons a defendant can obtain
18 his GED while he's incarcerated, he can obtain a trade, he
19 can work in UNICOR and obtain a trade that way, or he can
20 go to a specialized vocational school, he can take classes
21 such as family parenting and different classes like that,
22 so in fact incarceration is also rehabilitative in and of
23 itself also, so the mere fact that supervised release is
24 not solely punishment does not mean that you cannot give
25 credit one for the other in this case.

1 QUESTION: But there's certainly a difference in
2 degree at least, isn't there, from the rehabilitative
3 aspects of supervised release as opposed to a prison?

4 MR. SCHAD: Yes. Yes, Mr. Chief Justice, and in
5 fact in this case I am confident that the defendant would
6 have certainly wanted to take the 2-1/2 years and served
7 it on supervised release rather than be wrongfully
8 incarcerated in this case.

9 QUESTION: Mr. Schad, the difficulty I have with
10 your position is this. If I thought we were writing on a
11 totally clean or unwritten slate here, I would say yes, we
12 ought to try to tinker with the mechanism of supervised
13 release in order to give at least as much credit as can be
14 given for what the Government wrongfully exacted from him.

15 But the slate isn't clean, and when I look at
16 the supervised release scheme in the statute I see that
17 Congress in effect has said, there are two ways you can
18 tinker with it. You can reduce the supervised release
19 term down to a year, and you can, in fact, remove or
20 eliminate some of the customary conditions of supervised
21 release during the period in which it runs.

22 And that seems to suggest to me that Congress is
23 saying, this is the only kind of tinkering you can do. If
24 you find equitable grounds to do these things, you can do
25 them, but equitable grounds do not give you a basis for

1 doing anything more than this, so it sounds to me as
2 though Congress has in effect circumscribed and intended
3 to circumscribe the court's discretion here.

4 Is there an answer to that problem that I have?

5 MR. SCHAD: Justice Souter, in this particular
6 case, and with these particular facts, I would agree that
7 Congress has spoken in those two particular areas, but in
8 fact Congress presupposes -- when it writes as to those
9 issues it presupposes both a valid conviction and a valid
10 term of supervised release.

11 If you look at 3624(a) and 3624(e), both of
12 those presuppose that there is a valid term of conviction
13 and a valid term of supervised release. I would submit
14 that Congress never considered, and in fact the Sixth
15 Circuit also agreed with this --

16 QUESTION: But isn't it true that we do have a
17 valid conviction and a valid term of supervised release?
18 He's already served the time on the valid conviction, but
19 we do have a valid conviction.

20 MR. SCHAD: As to the -- yes, as to the drug
21 offenses he does have a valid conviction, but as to the
22 924(c) counts, it was not a valid conviction when it was
23 originally imposed by the sentencing court.

24 QUESTION: But the supervised release term is
25 not dependant entirely on the 924(c) count, is it?

1 MR. SCHAD: No. No, Justice Stevens.

2 QUESTION: Suppose he's released improperly.
3 There's an administrative snafu in the prison, and he's
4 released prematurely from the sentence that he's validly
5 serving. Does the supervised release time begin to run?
6 While he's out, do they credit him for supervised release
7 time?

8 MR. SCHAD: Yes.

9 QUESTION: They do?

10 MR. SCHAD: Yes, they would, until the
11 Government would bring him into court and request, I
12 guess, anticredit --

13 QUESTION: That he be reincarcerated?

14 MR. SCHAD: Yes.

15 QUESTION: So if he's walking around free for a
16 year because there's been an administrative mistake, and
17 then they yank him back in to serve the rest of his
18 sentence, he would have had a year knocked off of his
19 later supervised release time?

20 MR. SCHAD: That's correct, Your Honor, yes.

21 The bottom line in this case is that the
22 court -- the United States is reading 3624(e) and reading
23 that sentence alone, and states that the Congress was
24 clearly unambiguous when it wrote 3420 -- 3624(e).

25 If you look at petitioner's appendix 26a, where

1 it puts the entire 3624(e) in, if you look at the last
2 sentence of -- of 3624(e), it states that no prisoner
3 shall be released on supervision unless such petitioner --
4 prisoner agrees to adhere to an instalment schedule, not
5 to exceed 2 years except in special circumstances, to pay
6 for any fine imposed for the offense committed by such
7 prisoner.

8 Under a literal reading of that portion of
9 3624(e), a defendant would not be released by the Bureau
10 of Prisons until it agreed to this -- until it agreed to
11 this fine schedule, regardless of whether their sentence
12 of imprisonment had already run.

13 And that, if we're going to read 3624(e)
14 literally, all the way through, then under that literal
15 portion we have the same problem that Justice Scalia
16 talked about in a person being wrongfully imprisoned just
17 because the Bureau of Prisons didn't like them or
18 whatever. We have the same exact situation, if you read
19 that literally.

20 Of course, that's not what Congress intended,
21 and the cases that I've cited indicate that if Congress'
22 intent is contrary to what the plain language of the
23 statute says, then in fact this Court can read it to
24 construe the statute to Congress' intent, and I --

25 QUESTION: Whereas, what do you think the

1 situation is, if he says, heck, no, I won't sign? What is
2 the prison official supposed to do?

3 MR. SCHAD: Well --

4 QUESTION: Turn him loose anyway?

5 MR. SCHAD: Under a literal reading of 3624(e)
6 it would appear to me that he has to hold them until he
7 agrees to sign, regardless of the prison term.

8 QUESTION: Hold him until the supervised release
9 period is over?

10 MR. SCHAD: That's correct. Well --

11 QUESTION: In other words, if he refuses to
12 sign, you convert his supervised release into an
13 additional term of imprisonment.

14 MR. SCHAD: And that's the --

15 QUESTION: Which seems to me fair enough. Why
16 is that an absurd result? I mean, the deal is, we'll give
17 you supervised release if you agree to this. If you don't
18 want to agree to it, fine, we won't give you supervised
19 release. We'll keep you right here. That seems to you
20 very unjust?

21 MR. SCHAD: Yes. Yes, Justice Scalia, it is
22 unjust because it's not necessarily one of the terms of
23 their supervised release in --

24 QUESTION: Oh, but it says that. It says that.

25 MR. SCHAD: Yes.

1 QUESTION: No prisoners shall be released -- it
2 seems to me what they're telling the prison official is,
3 if he doesn't agree to pay, to pay the fine he owes,
4 convert his supervised release time into additional
5 imprisonment time.

6 MR. SCHAD: And in effect what you would have
7 under that circumstance is, you would have a Bureau of
8 Prison official making the decision as to, incarcerate the
9 defendant for a longer period of time without any hearing,
10 without any due process. It would just be that this
11 determination was made, therefore we're holding him for
12 the balance of the term.

13 QUESTION: Perfectly consistent with the process
14 set out in the sentence. He has not complied with
15 something that the Congress has said he has to comply with
16 for supervised release. I don't see any due process
17 question there.

18 MR. SCHAD: Mr. Chief Justice, when a defendant
19 is accused of violating the terms of his supervised
20 release, once he is out he then has a hearing before the
21 United States district judge and he can defend himself, he
22 has the right to counsel, and only after a finding that he
23 has in fact violated the terms of his supervised release
24 can he then be reincarcerated, and it's up to the judge,
25 the sentencing judge to not only find the term of -- or

1 find the revocation but also find the new term.

2 QUESTION: Well, very likely, if he felt that he
3 had agreed to the installment schedule and the prison
4 official was just being arbitrary and not releasing him,
5 he would have an action for habeas corpus, the district
6 court to tell him that he's no longer being properly
7 incarcerated, but that doesn't go to whether Congress can
8 exact that sort of a condition.

9 You're saying if the prison official improperly
10 passes on the facts he should have a chance to challenge.
11 Of course he does, but if the prison officer is right on
12 the facts, the guy should stay.

13 MR. SCHAD: Mr. Chief Justice, I'm submitting
14 that in fact no -- Congress did not intend for the result
15 that the plain language of the statute intends. They
16 didn't enact part of 3624(e) --

17 QUESTION: What's the best talisman, or index
18 for deciding what the intent of Congress was? What better
19 than the words they chose?

20 MR. SCHAD: Yes, Your Honor, you have -- but in
21 order to look at the Congress' intent, you not only have
22 to look at the exact -- or the language that we're
23 speaking of, but you have to look at the overall structure
24 of the statute and the related statutes that are imposed
25 at the same time.

1 QUESTION: Why is this inconsistent with the
2 other provisions, the provision -- the last sentence, that
3 you say they couldn't possibly have meant literally?

4 MR. SCHAD: Well, because in any other
5 circumstance the defendant in violation of a supervised
6 release term is entitled to the full due process rights.
7 This would be the only circumstance in all of the United
8 States Code in which a defendant would not be entitled to
9 the due process of going before the judge and having the
10 right to counsel. This would be the only one, if in fact
11 that was the case.

12 QUESTION: I don't understand what the
13 alternative that you think Congress had in mind is.

14 MR. SCHAD: Well --

15 QUESTION: If Congress didn't want them to keep
16 the guy until he signs the agreement, which they say he
17 must sign, what was -- what is -- what are you supposed to
18 do, torture him until he coughs up the agreement? What --

19 MR. SCHAD: No, Justice Scalia.

20 QUESTION: What is your alternative? How do you
21 think that sentence ought to be played out?

22 MR. SCHAD: I would submit that --

23 QUESTION: The guy says, heck no, I won't sign.

24 MR. SCHAD: I would submit that any Bureau of
25 Prisons official is, even if they do not sign is going to

1 release them and then probably --

2 QUESTION: In violation of the law, which says
3 no prisoner shall be released unless he agrees to adhere
4 to, and he hasn't agreed to.

5 MR. SCHAD: Yes. I believe that any Bureau of
6 Prisons official --

7 QUESTION: And that's your -- that in your mind
8 gives a more reasonable interpretation of this statute?

9 MR. SCHAD: Yes. Yes. But --

10 QUESTION: Are you helped by the second-to-last
11 sentence, in your view, which does conceive of the
12 proposition that there can be concurrent running --

13 MR. SCHAD: Well --

14 QUESTION: -- and you would say this is not in
15 connection with a conviction, so that sentence is
16 inapplicable?

17 MR. SCHAD: Yes, Justice Kennedy. One of the
18 arguments that the United States has made is that no
19 part -- that supervised release and detention are
20 antonyms, and therefore they can never be run concurrently
21 with each other in --

22 QUESTION: And you say the statute itself
23 acknowledges that possibility in the 30-day context when
24 it is in connection with a conviction, and you would have
25 to say this is not in connection with a conviction.

1 MR. SCHAD: That's correct.

2 QUESTION: The excess time.

3 MR. SCHAD: That's correct, and with regards --
4 one item that we haven't looked at is the -- how 18 U.S.C.
5 section 3742 plays out, and how in the case where a
6 defendant is -- where we're not looking at a retroactive
7 application of Bailey, but we're looking at a guideline
8 sentence that was imposed erroneously, if a defendant
9 receives a term of, let's say, 3 years imprisonment and a
10 1-year term of supervised release, then if he -- if that
11 defendant does not get through the appellate process by
12 the time the 3 years imprisonment have occurred, then the
13 case is mooted and the defendant in that case is not
14 entitled to any relief.

15 QUESTION: Why is that so? Aren't there
16 collateral consequences to a criminal conviction that
17 would still entitle the defendant to appeal?

18 MR. SCHAD: Well, the question would be whether
19 or not in that case there is enough to obtain
20 jurisdiction. The only collateral consequence that some
21 of the cases that I've cited to talks about, there's two
22 consequences that they say are a result of that.

23 One of those is the fact that supervised release
24 can be credited against for the wrong term of
25 imprisonment, and then the second part of that is in the

1 situation where, if a future crime is committed, that the
2 length of this sentence could have impact on the length of
3 the future sentence.

4 But then you're getting, if the only collateral
5 consequence is that particular matter, the length of the
6 sentence affecting the length of a future sentence that
7 may occur somewhere down the road, then you're getting to
8 the point where there might not be a case or controversy
9 sufficient enough for a court of appeals to decide the
10 matter.

11 So that collateral consequence is the only one
12 that's discussed. If that's the only collateral
13 consequence that we're talking about, I would have a
14 question as to whether or not the court of appeals could
15 even have the case, or whether it would be mooted at that
16 point.

17 In the case where a defendant received a term of
18 under a year, then conceivably that part of it wouldn't
19 even make a difference, because it might not make any
20 difference on his future sentence, so you have a situation
21 where you have a defendant who's obtained a wrongful
22 guidelines sentence and has no way to vindicate that
23 wrongful sentence under 3742, which Congress clearly
24 intended to be allowed.

25 QUESTION: As far as the guidelines are

1 concerned, wasn't there a change made in response to
2 whatever was the court of appeals decision to say that you
3 can't go back any further than time served?

4 MR. SCHAD: Yes, Justice Ginsburg. That was in
5 response to the United States v. Blake case, which was one
6 of the cases that we cited, and I would submit that that's
7 further evidence that the Sentencing Commission believed
8 that you could provide credit against supervised release,
9 otherwise they wouldn't have made the change in the
10 sentencing guidelines to take care of that particular
11 problem.

12 QUESTION: Why not? If they have one -- had
13 precedent going the other way they'd want to remove any
14 doubt on this subject.

15 MR. SCHAD: That would be the case if, in fact,
16 that particular guideline was made retroactive, which it
17 was not under 1B1.10.

18 QUESTION: Mr. Schad, would the apparent
19 unfairness of this thing -- at least I consider it
20 apparently unfair -- be remedied if we held that it would
21 be an abuse of discretion for a judge not to exercise his
22 option to remit the supervised release time?

23 MR. SCHAD: Justice Scalia --

24 QUESTION: I mean, it is within his discretion,
25 but couldn't we say it would be an abuse in these

1 circumstances not to --

2 MR. SCHAD: Is Justice Scalia referring to the
3 3583, the credit after the 1-year term of -- the early
4 termination provision?

5 QUESTION: Right.

6 MR. SCHAD: Well, the problem with that, Justice
7 Scalia, is that --

8 QUESTION: You still get 1 year.

9 MR. SCHAD: -- first you have to serve a year.

10 QUESTION: You still get 1 year.

11 MR. SCHAD: Before you can even ask. So you
12 have that problem, and in this particular defendant's case
13 it would make a difference, because he only had 6 months
14 to go at the time that he was released, if he would have
15 gotten the full credit, so he would have had to serve an
16 additional 6 months before he could --

17 QUESTION: Before he could even ask, right.

18 MR. SCHAD: And then we still have the problem
19 with the judge's discretion, and even if it's under abuse
20 of discretion standard, by the time a particular defendant
21 could get it up to the court of appeals, then we -- he
22 would more than likely serve a lot of his term anyway.

23 QUESTION: Well, on the other hand, if the
24 Government -- if the judge wrongfully allows him, the
25 Government would have a long time to get it up to the

1 court of appeals, so that works both ways.

2 MR. SCHAD: That's correct, Mr. Chief Justice.

3 If there are no further questions, thank you.

4 QUESTION: Thank you, Mr. Schad.

5 Ms. McDowell, you have 17 minutes remaining.

6 REBUTTAL ARGUMENT OF BARBARA B. McDOWELL

7 ON BEHALF OF THE RESPONDENT

8 QUESTION: The only question I have,
9 Ms. McDowell, is how do you interpret in connection with
10 the conviction in the second-to-last sentence? Do you say
11 that this sentence that was being served here was in
12 connection with the conviction, the excess portion?

13 MS. McDOWELL: Yes, it was.

14 QUESTION: Ms. McDowell, how do you -- how would
15 the Government construe this situation, which came up in
16 one of the hypotheticals:

17 An individual is prematurely released. It's a
18 mistake. During the period of release, the individual is
19 on supervised release. Then the mistake is recognized,
20 the prisoner is hauled back and reincarcerated to serve
21 some remainder of time. Under those -- and ultimately, of
22 course, he's released again.

23 When the prisoner is released, this time
24 properly, is there a credit against the supervised release
25 time for the period of supervised release between the two

1 incarceration?

2 MS. McDOWELL: I don't believe that the
3 situation has ever come up. If the defendant was actually
4 serving supervised release under the supervision of the
5 probation office --

6 QUESTION: Yes. He signed the form and they
7 supervised his job and so on. They did -- everything was
8 done, so he was actually being supervised during the
9 period of the release. Would he get credit for it when he
10 was released the second time?

11 MS. McDOWELL: He might well, Your Honor,
12 because under the wording of the statute his term of
13 supervised release would have commenced upon his first
14 release from prison. It then would have been tolled when
15 he went back to prison for the period that he was spending
16 there, and then would start up again once he was
17 released --

18 QUESTION: Well, that serves the --

19 MS. McDOWELL: -- so I think it's possible it
20 would be construed that way to give him credit.

21 QUESTION: That serves the literal terms of the
22 statute, which is your argument, but it does sort of
23 undercut the theory that we need to be literal about the
24 terms of the statute, because the prisoner in effect is in
25 need of this supervision for whatever period of time is

1 prescribed, and so it would seem that the literal
2 interpretation and the rationale for being literal seem to
3 be at odds with each other in that situation.

4 MS. McDOWELL: Well, the district court would
5 still have the opportunity, if it appeared necessary to
6 extend the defendant's term of supervised release, if it
7 appeared necessary to serve the deterrence and
8 rehabilitation purposes beyond the term that was initially
9 imposed, unless it was already --

10 QUESTION: And hence would --

11 MS. McDOWELL: -- to a maximum.

12 QUESTION: Would likewise, then, have discretion
13 I presume, on your theory, not to give any credit at all.

14 MS. McDOWELL: Effectively not to do that by
15 lengthening a term of supervised release.

16 However, if it was a case where there was a
17 maximum time of supervised release that the defendant
18 could serve, if he had served, say, 1 year before he went
19 back into prison there might be a limit beyond which the
20 district court couldn't go in extending the period --

21 QUESTION: Basically I guess your argument is,
22 no system is perfect, but we're going to get closer to
23 what Congress intended if we just be literal about this.
24 That's what it boils down to.

25 MS. McDOWELL: That's correct, Your Honor.

1 QUESTION: Of course, your answer really doesn't
2 make everything work out okay. If he is subject to parole
3 on another conviction, maybe even from another sovereign
4 on a State conviction, the statute provides that his
5 Federal supervised release shall run concurrently with
6 that other parole or supervised release, right?

7 MS. McDOWELL: That's correct.

8 QUESTION: So suppose he has 2 years parole on a
9 State conviction he has to serve after he's done his
10 Federal sentence, okay. He also has a 2-year Federal
11 supervised release sentence. They let him out early. He
12 serves his 2 years Federal supervised release, which he
13 would normally have been serving concurrently with his
14 State parole for 2 years, right?

15 MS. McDOWELL: Right.

16 QUESTION: Okay. You find out the mistake, you
17 bring him back in, he's going to have to serve another
18 2 years of supervised release, isn't he, or parole? He'll
19 have to serve his State parole even though -- see what I
20 mean?

21 MS. McDOWELL: That would be a matter of State
22 law.

23 QUESTION: He will have lost 2 years of freedom,
24 in effect.

25 MS. McDOWELL: Oh, whether he would still have

1 to spend the term of State parole or not would be a
2 matter --

3 QUESTION: Up to the State.

4 MS. McDOWELL: -- of State law for -- the State
5 judge might decide that he would not have to serve in
6 those circumstances --

7 On the --

8 QUESTION: May I ask kind of one -- just ask you
9 to comment on one thing? One of the things that's
10 troubling all of us, I think, is the extent to which the
11 supervised release is really the functional equivalent of
12 what -- the time he's already served, or its -- in its
13 punitive aspects, and one of the provisions of the statute
14 that provides what goes into the supervised release is the
15 kind of a catch-all provision that the judge can impose
16 any other condition it considers to be appropriate.

17 Is there -- is that as unlimited, in your view,
18 as it sounds? I mean, could the judge require him to
19 report every 3 days instead of every 30 days, and so
20 forth?

21 MS. McDOWELL: Yes, Your Honor, if the judge
22 felt that that was necessary to serve the purposes of
23 supervised release.

24 In addition to the statute, the Sentencing
25 Guidelines set forth the standard conditions of supervised

1 release that should be imposed in most cases, and that
2 provides a little more clarity to what's in the statute.

3 QUESTION: Do the standard conditions include a
4 consent to warrantless searches and that sort of thing?

5 MS. McDOWELL: Essentially it's a consent that
6 the probation officer may visit the defendant's home and
7 seize whatever he happens to find there.

8 QUESTION: Unannounced visits and that sort of
9 thing.

10 MS. McDOWELL: That's correct.

11 On the point that a term of imprisonment may
12 serve some of those same rehabilitative purposes as
13 supervised release, that may be true, but supervised
14 release is, indeed, different, because the defendant is
15 living in the community. It's only then that he can be
16 expected to maintain a regular job, to receive the
17 outpatient drug counseling that he may need, to meet his
18 child support and other family obligations.

19 It's one thing, for example, for a defendant to
20 remain drug or alcohol-free when he's in prison, where
21 drugs are not available at all, or available only in rare
22 circumstances, and where he is under constant and
23 pervasive supervision. It's quite another matter for the
24 defendant to avoid use of drugs and alcohol when he's back
25 in the community, subject to the same pressures and

1 influences and temptations that got him into trouble in
2 the first place. That's one of the many reasons why
3 supervised release is different, and why it is necessary
4 as a rehabilitative measure.

5 On the point that Mr. Schad raised about the
6 possible mooted of the case, the court of appeals held
7 that the defendant's term of supervised release had
8 terminated upon the issuance of the court of appeals
9 decision. At that point, he still had approximately 9
10 months to serve on supervised release. Given the court of
11 appeals opinion, it would be incorrect to assume that the
12 defendant was still continuing in some manner to serve his
13 term of supervised release, albeit without any sort of
14 supervision by the probation office.

15 In terms of holding defendant if he fails to
16 agree to the payment, to a fine schedule, it's our
17 understanding that the Bureau of Prisons indeed will hold
18 defendants in those circumstances for the period of
19 supervised release if they don't agree to a fine schedule.

20 QUESTION: Instead of torturing them. I'm glad
21 to hear that.

22 (Laughter.)

23 QUESTION: I thought they'd probably do that.

24 MS. McDOWELL: In terms of Mr. Schad's point on
25 the necessity for a crediting rule in order to preserve

1 appeals, Congress, as we pointed out in our reply brief,
2 as dealt with that problem much more directly in 18 U.S.C.
3 3143, which provides for a defendant to be -- remain on
4 release status pending his appeal if it appears that
5 otherwise his sentence could expire before his appeal is
6 decided.

7 That, of course, is available only in particular
8 circumstances where the defendant is not a threat or a
9 risk of flight, and where he has some likelihood of
10 prevailing on his appeal.

11 Finally, Justice Scalia had inquired whether an
12 abuse of -- it might be held to be an abuse of discretion
13 if a district court refuses to release a defendant in
14 these circumstances after 1 year. The statutory language
15 doesn't seem to allow that sort of rule, because it
16 requires the district court to consider not only the
17 interests of justice but also the conduct of the
18 defendant, and if the defendant's conduct does not warrant
19 the elimination of all supervised release at that time, it
20 would be inappropriate to release him.

21 The statute requires that the district court
22 take into account a number of factors in deciding a motion
23 under 3583(e)(1). That includes not only the interests of
24 justice, but also the protection of the community and the
25 defendant's continuing rehabilitation needs.

1 Thank you.

2 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
3 McDowell. The case is submitted.

4 (Whereupon, at 10:49 a.m., the case in the
5 above-entitled matter was submitted.)

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CERTIFICATION

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

UNITED STATES, Petitioner v. ROY LEE JOHNSON
CASE NO: 98-1696

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BY Ann Marie Federico

(REPORTER)