

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CORNELL JOHNSON, Petitioner v. UNITED STATES.

CASE NO: 99-5153 c-2 ✓

PLACE: Washington, D.C.

DATE: Tuesday, February 22, 2000

PAGES: 1-55

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OF THE
UNITED STATES

CAPTION: CORPUS CHRISTI, TEXAS
CASE NO.: 00-512
PLACE: Washington, D.C.
DATE: March 22, 2000
PAGES: 1

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THE SUPREME COURT

U.S. SUPREME COURT

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CORNELL JOHNSON, :

4 Petitioner :

5 v. : No. 99-5153

6 UNITED STATES. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, February 22, 2000

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

13 APPEARANCES:

14 RITA LA LUMIA, ESQ., Assistant Federal Community Defender,
15 Chattanooga, Tennessee; on behalf of the Petitioner.

16 PAUL R.Q. WOLFSON, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the 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 No. 99-5153, Cornell Johnson v. the United States.

5 Ms. La Lumia. Am I pronouncing your name
6 correctly?

7 ORAL ARGUMENT OF RITA LA LUMIA

8 ON BEHALF OF THE PETITIONER

9 MS. LA LUMIA: It's pronounced La Lumia.

10 QUESTION: La Lumia. I stand corrected.

11 MS. LA LUMIA: Thank you.

12 Mr. Chief Justice --

13 QUESTION: It's like Scalia. Right? Lumia.

14 (Laughter.)

15 MS. LA LUMIA: Something like that. Something
16 like that.

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

18 The issue presented in this case is whether
19 reimposition of supervised release under the provisions of
20 subsection (h) of the supervised release statute violates
21 the Ex Post Facto Clause in this case.

22 The Ex Post Facto Clause prohibits any law that
23 is applied retrospectively and, in application,
24 disadvantages an individual by imposing a sentence that is
25 greater or harsher than that which would have applied at

1 the time that the offense was committed.

2 The respondent in this case has effectively
3 conceded that the application of the provisions of
4 subsection (h) in this case and reimposition of supervised
5 release is retrospective in this case. However, the
6 question remains then whether respondent was disadvantaged
7 by application of those provisions and reimposition of
8 supervised release.

9 QUESTION: What -- what do you mean or what do
10 you think respondent -- by the term retrospective?

11 MS. LA LUMIA: Retrospective means an
12 application of a statute that is applied after commission
13 of the offense, the initial offense. And in this case the
14 -- the operative date is the date of Mr. Johnson's
15 offense. His credit card crime was committed in 1993 and
16 that would be the operative date because supervised
17 release is a punishment that springs forth from that
18 offense.

19 QUESTION: From that offense.

20 MS. LA LUMIA: Yes.

21 QUESTION: Now, the First Circuit, in an opinion
22 by Judge Selya I believe, thought that the original
23 statute, 3583(e) unmodified permitted the same thing.
24 Isn't that right? That was the First Circuit position.

25 MS. LA LUMIA: That's correct. That is the --

1 QUESTION: So, if that were the case, it
2 wouldn't matter that 3583(h) was enacted I suppose. There
3 wouldn't be a change.

4 MS. LA LUMIA: That's -- that's exactly right,
5 Justice O'Connor.

6 QUESTION: So, if we were to adopt the First
7 Circuit view, end of case.

8 MS. LA LUMIA: That's correct. That's correct.
9 There would be no need, as you say, for Congress to have
10 enacted subsection (h).

11 QUESTION: Well, except there was a split of
12 authority and I suppose they wanted to deal with that.

13 MS. LA LUMIA: That's right. And --

14 QUESTION: Because we hadn't.

15 MS. LA LUMIA: I think that there was an
16 invitation for this Court to deal with it because there
17 was a circuit split. And in fact the majority of the
18 circuits that addressed the issue to which you are
19 referring have determined that subsection (e)(3), the
20 earlier version, that was in effect at the time of Mr.
21 Johnson's offense --

22 QUESTION: But we don't weigh the number. We
23 weigh the persuasiveness.

24 MS. LA LUMIA: I'm sorry.

25 QUESTION: We weigh the persuasiveness of the

1 Court's reason, not how many were on one side versus the
2 other. And O'Neil, as you conceded -- if O'Neil was
3 correct, that is the end of this case. So, please focus
4 on why O'Neil was incorrect because at least I found it a
5 fairly persuasive analysis.

6 MS. LA LUMIA: The decision in O'Neil is
7 incorrect, and the rationale of several courts who have
8 addressed this issue is more persuasive.

9 The -- the initial approach in determining
10 whether subsection (e) (3) offered the authority for
11 imposition -- or reimposition of supervised release begins
12 with the statute itself. If one looks at the text of
13 subsection (e) (3), it's very, very clear on its face. It
14 permits a court, upon the correct findings -- in other
15 words, a violation of supervised release -- to revoke an
16 individual's supervised release and to -- to require that
17 the person serve in prison all or part of the term of
18 supervised release.

19 QUESTION: But they used the -- the term revoke
20 in (3) but terminate in (1). And it seems to me your
21 position would be stronger if they had used the word
22 terminate in (3) as well.

23 MS. LA LUMIA: I believe that there's a
24 difference that could be drawn from -- from the use of
25 terminate in subsection (e) (1) as opposed to revoke in --

1 as used in subsection (e) (3).

2 If you'll note, subsection (e) (1) contemplates a
3 termination of supervised release under very favorable
4 conditions. In other words, it's much like an honorable
5 discharge. A person is terminated -- a person's term of
6 supervised release is terminated if, after a period of 1
7 year, the court determines that the conduct of the person
8 released and the interest of justice warrant a termination
9 of supervised release.

10 QUESTION: Terminate has some sort of benevolent
11 connotation and revoke doesn't?

12 MS. LA LUMIA: Well, in this situation it -- it
13 does. Under subsection (1), the terminate does, indeed,
14 refer to a favorable resolution of the supervised release
15 term.

16 However, under subsection (e) (3) where the --
17 where Congress has used the word revoke, it demonstrates
18 an unfavorable conclusion of the term of supervised
19 release. And this is important to note because, you know,
20 subsection (e) (3) refers to revocation upon a violation of
21 the person's conditions of supervised release. In other
22 words --

23 QUESTION: Well, it's more than just
24 unfavorable. Isn't it? I thought the strongest point for
25 your case is that (3) goes on to say that the term -- that

1 the time he has already served in supervised release will
2 not count towards his future prison time. And in order to
3 prevent it from not counting towards it, the whole thing
4 has to be revoked. It isn't just terminated. It's
5 revoked as though -- as though it never occurred, and --
6 and the full amount of that supervised release time will
7 now be served in prison.

8 MS. LA LUMIA: That's exactly right, Justice
9 Scalia.

10 QUESTION: So, I mean, that explains using
11 revoked instead of terminated I suppose.

12 MS. LA LUMIA: That's exactly right, and if --

13 QUESTION: Where -- where does it say that you
14 can't -- sorry. What language is it? I've gotten a
15 little bit lost.

16 Which is the language that says -- I thought
17 that if you serve -- suppose I impose a term of 5 years
18 for a serious felony of supervised release.

19 MS. LA LUMIA: Yes.

20 QUESTION: 2 years passes, and the guy violates
21 14 conditions. I thought that under Selya's reading of
22 this, which I think makes sense to me and the others
23 don't, to put -- to say where I am at the moment -- what
24 you do is you say 5 years of supervised release. You
25 violated what you were doing. Therefore, you're back to

1 square one. I'll take that 5 years and I can divide it 3
2 years jail, 2 years supervised release. That's why they
3 use the term part.

4 And moreover, it makes sense. Why would you
5 normally have a person adjust to the community but the
6 person who's really worse because he's violated his
7 supervised release, you'd say you're not going to have any
8 adjustment period. Why wouldn't they want to leave that
9 up to the judge? Divide it.

10 MS. LA LUMIA: Well, and in fact, Congress has
11 made that authority available by enactment of subsection
12 (h).

13 QUESTION: I know that. But, I mean, why
14 wouldn't they have wanted it, as frankly I always they
15 thought they did, from day one since there is no other
16 reading that makes any sense? Now, that -- that's -- I'm
17 putting that pretty strongly, but I want to -- I want to
18 get your answer.

19 And I didn't think it said that you can't -- if
20 he's -- if it's 5 years that you sentenced him to
21 supervised release and he violated it after 4 years, I
22 thought -- but I might be wrong -- you're back at square
23 one. You can send him to prison for the whole 5 years.
24 You can send him to prison for 3 years, whatever. Is that
25 -- am I wrong about that?

1 MS. LA LUMIA: That's correct.

2 QUESTION: I'm right.

3 MS. LA LUMIA: That is correct. That is a
4 correct reading of subsection (e)(3) or subsection (h).

5 QUESTION: All right. So, then why isn't
6 Selya's -- we're back there. Why isn't Selya's thing the
7 common sense reading of it, and why isn't the common sense
8 reading of it at least permitted by the language?

9 MS. LA LUMIA: The starting point would be a
10 look at the word revoke. And revoke, under the plain
11 dictionary definition, means to cancel or annul.

12 QUESTION: But how can you maintain that when
13 (h), which does take the position you would say
14 prospectively only -- that section also uses the term
15 revoked, and then spells out that you revoke it, you go
16 back to square one, and you can make the division, but not
17 quite as you conceded before because (e)(3) says even if
18 the term of that's revoked is 3 years of supervised
19 release, you can put him back in prison only for 2 years
20 for this category of offense. Isn't that so?

21 MS. LA LUMIA: Yes. For this category of
22 offense, that's correct. There is a limit imprisonment.

23 QUESTION: So, you -- so, the extra year that's
24 been revoked under your reading doesn't get made up. It
25 just drops out.

1 MS. LA LUMIA: Under our reading of subsection
2 (e) (3) that was in effect at the time of Mr. Johnson's
3 offense, the -- the authority that's provided by
4 subsection (e) (3) is strictly for revocation. However, in
5 subsection (h), which you referred to, Justice Ginsburg,
6 there is authority given for reimposition of supervised
7 release.

8 QUESTION: Well, I think --

9 QUESTION: Yes, but the word revoked -- you
10 can't put much weight on it when it's retained in the
11 section that does say, Judge, here's the 3 years. You can
12 divide it not more than 2 in prison, but then you have
13 another year left over. You can put him on supervised
14 release, using the word revoked. So, I don't see how you
15 can -- you can say the word revoke means one thing in (h)
16 and something different in (e) (3).

17 MS. LA LUMIA: In -- in subsection (h), where
18 Congress has specifically authorized the courts to
19 reimpose supervised release, they have given that
20 authority upon consideration of the split in authority
21 that's come out -- a split in the circuits' decisions --

22 QUESTION: Well, that's what -- it -- it seems
23 to me that you are better off with (h) because you can say
24 (3) has this very strict reading and we - -.

25 But under your insistence, I think proper

1 insistence, that we look at the statute at the time the
2 offense was committed, (h) wasn't there.

3 MS. LA LUMIA: That's correct.

4 QUESTION: So, I think we have to -- I -- I
5 suppose we have to look at the statute as if (h) were not
6 there, other than the Congress gives a reading which we
7 may give some -- some weight to because it seems to
8 interpret the statute in a particular way. I don't -- I
9 don't think (h) helps you much.

10 MS. LA LUMIA: I agree. I agree. I think that
11 subsection (e)(3), which is the operative statute in this
12 case because Mr. Johnson's offense was committed prior to
13 enactment of subsection (h), specifically limits --

14 QUESTION: So, although you'd like to use (h),
15 I'm not -- I'm not sure that you can. I should have said
16 I think it does help you, but I'm not so sure that you can
17 use it.

18 MS. LA LUMIA: I agree with you, and under
19 subsection (e)(3) where the Congress has provided the
20 authority to revoke a term of supervised release, if one
21 looks at a common, plain dictionary definition of the word
22 revoked, it clearly contemplates a recision, an end, a
23 conclusion, that type of thing, a termination of a
24 probation or -- or in this case, a supervised release
25 order because of a rule violation.

1 QUESTION: It doesn't have to.

2 QUESTION: Ms. La Lumia, is -- is Judge Selya's
3 position, the Government's position here, that the only
4 supervised release that can be imposed after the
5 revocation is whatever had not yet been served? I mean,
6 let's assume he had been given 5 years of supervised
7 release. He -- he violates the terms after 2 years, and
8 is -- is it -- is it Selya's position and the Government's
9 position that the court can impose an additional 5 years
10 of supervised release afterwards or only 3 years?

11 MS. LA LUMIA: I believe it's the Government's
12 position that they may impose 5 years of supervised
13 release.

14 QUESTION: The full 5 years. So, really what
15 you need to get to Selya's very intelligent position, as
16 Judge Breyer sees it, makes more sense. It probably does.
17 But to get there, what you need is some authorization to
18 impose a term of supervised release at this stage, and the
19 only -- the only authorization for imposing supervised
20 release is 3583(a), which says the court in imposing a
21 sentence to a term of imprisonment for a felony or
22 misdemeanor may include as part of the sentence.

23 At the original sentencing, you have authority
24 to impose 5 years. I don't know where you get the
25 authority to impose 5 years under (e)(3). Maybe -- maybe

1 you have authority to use the leftover -- the leftover 3
2 years, but where do you get authority to impose the -- the
3 new 5? You're not the one who should answer that
4 question, but the Government will answer it, I am sure.

5 QUESTION: Well, it's (e) (2). I mean, isn't the
6 answer (e) (2)?

7 QUESTION: (e) (2).

8 MS. LA LUMIA: Under -- under subsection
9 (e) (2) --

10 QUESTION: (e) (2) talks about extending a
11 term --

12 MS. LA LUMIA: Allows --

13 QUESTION: -- which has already been revoked.

14 QUESTION: Well, then the maximum was -- was
15 imposed.

16 QUESTION: No, no. (2) can extend. See, (e) (2)
17 allows you to extend the term of supervised release if
18 less -- if less than the maximum authorized.

19 QUESTION: Was -- was previously imposed. I'm
20 assuming he imposed 5 years and the guy -- which is all
21 that was authorized.

22 QUESTION: No, no. What he does is, first he
23 extends it.

24 QUESTION: Let counsel participate.

25 QUESTION: Well, counsel doesn't understand the

1 question.

2 MS. LA LUMIA: In this -- in this particular
3 case, the extent of the supervised release order at
4 initial sentencing for Mr. Johnson was 3 years. The judge
5 could and did impose a 3-year sentence of supervised
6 release at initial sentencing.

7 QUESTION: Was that the maximum he could have
8 imposed?

9 MS. LA LUMIA: Yes.

10 QUESTION: Okay.

11 MS. LA LUMIA: Yes, he did and he imposed the
12 maximum.

13 Upon revocation, however, the -- the statute is
14 clear. It allowed the district court to revoke a term of
15 supervised release and required the defendant to serve all
16 or part of the term in prison with the limitation that
17 only 2 years may be imposed for reimprisonment. In other
18 words, Congress capped a period of time for a court to
19 impose a sentence of imprisonment as a punishment for that
20 person's willful violation of his conditions of supervised
21 release.

22 QUESTION: Yes. So, what happened here on the
23 -- the additional order by the court? Did they stay
24 within the original 5-year term?

25 MS. LA LUMIA: No. In this case, the -- the

1 court -- well, there is -- there was no -- there was no
2 initial 5-year term that was available for supervised
3 release. It was a 5-year --

4 QUESTION: No, but an overall 5-year.

5 MS. LA LUMIA: Yes. At initial sentencing, the
6 court could have imposed 5 years of imprisonment and could
7 have imposed 3 years of supervised release to follow. And
8 in the first instance, at initial sentencing, the court
9 did impose 25 months based on guidelines factors that were
10 appropriate in Mr. Johnson's case. In other words, the
11 court --

12 QUESTION: Okay, and on revocation, what
13 happened? I mean, what limitation was imposed after the
14 revocation of the supervised release?

15 MS. LA LUMIA: Upon revocation, the limit under
16 subsection (e)(3) is a maximum period of reimprisonment of
17 2 years.

18 QUESTION: And that's what was given?

19 MS. LA LUMIA: No, not in this case. The court
20 ordered 18 months of reimprisonment --

21 QUESTION: All right.

22 MS. LA LUMIA: -- and thereafter imposed a
23 sentence of supervised release that -- it's our position,
24 that no supervised release of any length of time was
25 permissible.

1 QUESTION: I know that's your position. What
2 was imposed?

3 MS. LA LUMIA: 1 year. 1 year. And that placed
4 the maximum period of restraint on liberty following Mr.
5 Johnson's revocation at 2 and a half years. Under
6 subsection (e)(3), the maximum period of restraint in the
7 form of imprisonment would have been 2 years.

8 QUESTION: Counsel --

9 QUESTION: But the total -- but the total
10 supervised release was still under 3 years?

11 MS. LA LUMIA: In this particular case --

12 QUESTION: How much supervised release had he
13 served before he violated it and it was -- and it was
14 revoked?

15 MS. LA LUMIA: Roughly 7 months.

16 QUESTION: Okay, so --

17 MS. LA LUMIA: It was roughly 7 months at the
18 time that he committed a new crime and --

19 QUESTION: So, it was all within the statutory
20 maximum.

21 QUESTION: All within the statutory maximum for
22 supervised release at the original sentencing.

23 MS. LA LUMIA: No. At -- actually at original
24 sentencing, the maximum was 3 years. Upon -- he was
25 released on supervised release. He served approximately 7

1 months.

2 QUESTION: Right and now has another -- another
3 how many?

4 MS. LA LUMIA: He had another year of supervised
5 release. However, that, coupled with the 2 years --
6 excuse me -- the 18 months of imprisonment that the judge
7 ordered upon revocation, put him over the 2 years.

8 QUESTION: Counsel, would you please --

9 QUESTION: No, but it was --

10 QUESTION: -- clarify one thing which I think
11 there's been some confusion about? As I understand your
12 position, you are not contesting that if this judge said
13 -- if this judge said, I'm not going to put you back in
14 prison, but the 3 years is revoked and it's restarted,
15 that it would have been proper under the statute, as it
16 existed before (h), to say start over on supervised
17 release, 3 years of supervised release. I do not
18 understand you to be disputing that. Am I correct?

19 MS. LA LUMIA: That the period of time had not
20 been reached? That's correct.

21 QUESTION: That the judge could have said,
22 without regard to how much time he had served, you go back
23 on supervised release for 3 years. Didn't the statute
24 permit that?

25 MS. LA LUMIA: I would disagree with that

1 interpretation of subsection (e)(3).

2 QUESTION: What did it permit?

3 MS. LA LUMIA: It permitted the court, upon
4 revocation, to require the person to serve in prison all
5 or part of the term -- excuse me -- to require the person
6 in prison all or part of the term.

7 QUESTION: It required prison time?

8 MS. LA LUMIA: It allows the court.

9 QUESTION: If it allowed prison time but didn't
10 require it, wouldn't it allow supervised release to rerun
11 on the idea that it's revoked and it starts over?

12 MS. LA LUMIA: I would disagree with -- with
13 that. I think that the -- the notion that created some -
14 - that there was discretion in the district court's order
15 allowed the court the discretion -- the all or part
16 language -- to --

17 QUESTION: All or part.

18 MS. LA LUMIA: All or part of the -- up to 2
19 years. And it allowed the court to impose a 1-month
20 prison term if the court deemed that that was appropriate
21 under the circumstances.

22 QUESTION: Your position is all or nothing.
23 Imprisonment, freedom, but no supervised release once it's
24 revoked.

25 MS. LA LUMIA: No supervised release once it's

1 revoked under subsection (e)(3), but it's not so much all
2 or -- all or nothing. It's not 2 years of imprisonment or
3 no imprisonment. It's a period up to 2 years.

4 QUESTION: Well, it's all -- all or nothing in
5 the sense that it's rather odd to say that the judge can
6 either -- must either set him free or put him in prison
7 and can't give him the lesser punishment. But that's --
8 but that's your position.

9 MS. LA LUMIA: But that's assuming that
10 supervised release is a lesser punishment and -- and I
11 would not be willing to state that supervised release is a
12 less harsh or -- a less harsh punishment than
13 imprisonment.

14 QUESTION: But your -- as I understand it, your
15 position is that whatever combination of imprisonment and
16 supervised release, whenever imposed, that -- the total
17 amounts of those two components -- the total lengths of
18 those two components may not extend beyond the maximum
19 date that -- that would have been possible for those two
20 components at the time of sentencing. Is that correct?

21 MS. LA LUMIA: There's a -- a limitation on what
22 can be imposed. There's a -- under subsection (e)(3) --

23 QUESTION: But let me make it -- let me make it
24 simple. If at the time of sentencing -- forget this -- I
25 don't know what it was in this case. If at the time of

1 sentencing the judge had said I'm going to impose the
2 maximum of -- of imprisonment and release, and the maximum
3 would have been 5 years -- he could have, you know, given
4 him 1 year in prison, 4 years of supervised release, or
5 whatever, but the maximum is 5 years. Is it your position
6 that at -- at any revision, he may not impose anything
7 that extends beyond that 5-year date? Is that your
8 position?

9 MS. LA LUMIA: That is the position because
10 that's the statutory -- that would be the statutory
11 authority provided by Congress.

12 QUESTION: But isn't --

13 QUESTION: That and then some. You go beyond
14 that.

15 QUESTION: But he's wrong on the statute. The
16 statute is 5 years prison plus 3 years supervised release
17 was the maximum. Wasn't it?

18 MS. LA LUMIA: That's right. And I think maybe
19 I'm misunderstanding --

20 QUESTION: No, no, but I -- I didn't mean in
21 this case. But whatever the -- the -- whatever the total
22 length of imprisonment and supervised release may be in
23 any case, is it your position that at any subsequent
24 recomputation under (c), the total of those two components
25 may not extend beyond the date which would have been the

1 maximum date at time of sentence? Is that your position?

2 MS. LA LUMIA: Under (c)? I'm not -- I'm not -

3 -

4 QUESTION: Is your answer to Justice Souter that
5 in your view, once there's been a revocation, there cannot
6 be the second component at all?

7 MS. LA LUMIA: It is my position, in our view
8 under subsection (e)(3), that there cannot be an
9 additional imposition of supervised release --

10 QUESTION: Oh, I -- I realize that.

11 MS. LA LUMIA: -- of any period of time.

12 QUESTION: I realize that, but if you lose on
13 that point, is it then your position -- is your fall-back
14 position -- that whatever the maximum date for the
15 combination of those two components would have been at the
16 time of sentencing is the maximum date for whatever the
17 court imposes consisting of those two components at the -
18 - at the time of resentencing?

19 MS. LA LUMIA: In -- in this particular case,
20 the resentencing I believe that you're referring to is
21 upon revocation.

22 QUESTION: Yes.

23 MS. LA LUMIA: His initial sentencing -- at his
24 initial sentencing, the court had a certain term of
25 imprisonment available, subject to the sentencing

1 guidelines factors, and a certain period of supervised
2 release available. Upon revocation and within the -- the
3 supervised release statute, upon revocation, the court did
4 not have the same period of imprisonment available. It
5 had a limit on the period of imprisonment --

6 QUESTION: Okay. So, let's assume that there
7 could only have been 2 years imprisonment, and whatever
8 else there was could have been supervised release. You
9 don't concede that, but let's assume it for the sake of
10 argument. Is the date beyond which that combination
11 cannot extend the same date beyond which such a
12 combination could not have extended at the time of
13 original sentencing?

14 MS. LA LUMIA: Yes.

15 QUESTION: Okay.

16 QUESTION: But it won't help you in this case.

17 MS. LA LUMIA: I'm sorry. I didn't hear --

18 QUESTION: It won't help you in this case. I
19 mean, you --

20 MS. LA LUMIA: That -- that's right.

21 QUESTION: Because it -- it didn't go beyond
22 that. There was -- what was it -- 2 years, 5 months left.

23 MS. LA LUMIA: In this particular case, upon
24 revocation, even if we assumed that subsection (e)(3)
25 permitted a reimposition of supervised release, the period

1 of supervised release that would have been allowed was 3
2 years. And in this case if -- if we take the entire time
3 that Mr. Johnson has been under restraint, it would be the
4 7 months that he was on restraint for prior to his
5 revocation.

6 QUESTION: Well, excuse me.

7 QUESTION: No, you don't --

8 QUESTION: The statute says without credit for
9 time previously served on post-supervision release.

10 MS. LA LUMIA: That's correct.

11 QUESTION: It seems to me that those words say
12 you can go back. You give him no credit for time
13 previously served on posted -- post-release supervision.
14 You give him no credit for that. You can reimpose that
15 whole 3 years.

16 MS. LA LUMIA: That's -- that's correct.

17 QUESTION: But you said no when I asked a
18 question before.

19 MS. LA LUMIA: I'm sorry. I must have
20 misunderstood your question.

21 QUESTION: I asked you if you -- the judge is
22 reading (e)(3) and he says, ah, this tells me he gets no
23 credit for time previously served on post-release
24 supervision. So, we go back and I'm going to give him the
25 whole 3-year supervised release over again. No jail. No

1 prison. Is that -- was that lawful under (e) (3)?

2 MS. LA LUMIA: No, that's not -- the period of
3 time is a -- may be a lawful sentence because it has not
4 exceeded the 3-year limitation. However, the nature of
5 the sentence we would still argue is --

6 QUESTION: All right. Look. Wait. Your answer
7 to Justice Souter couldn't be what you said, I don't
8 think, if I understand it.

9 QUESTION: I don't think so.

10 QUESTION: Imagine it's a class A felony, not D.

11 MS. LA LUMIA: That's right.

12 QUESTION: And suppose the statutory maximum is
13 5 years prison, 5 years supervised release. He serves 5
14 years prison. The sentencing date was 1990, July 1. It's
15 now July 1995. He's finished. He then goes on supervised
16 release. 4 years and 360 days later he violates all the
17 terms. So, it is now the year 1999. The judge is
18 perfectly free to give him 5 years of prison even on your
19 theory, and therefore you could extend the term into 2004,
20 even on your theory.

21 But you're not denying that. You're denying
22 that the judge, instead of giving him the 4 years prison,
23 could give him 4 years of supervised release.

24 MS. LA LUMIA: That's -- that's correct.

25 QUESTION: Am I not right?

1 MS. LA LUMIA: That's correct. However, there
2 are certain limitations in the statute.

3 QUESTION: Yes, there are limitations. If it's
4 a class D felony, you can't put him in for more than 2
5 years, and yours happens to be a class D felony. And they
6 didn't put him in for more than 2 years.

7 So, the whole thing comes down to the meaning of
8 the word revoke.

9 MS. LA LUMIA: That's right.

10 QUESTION: And your view is revoke means
11 terminate and finish. And their view means revoke means
12 call back, but you can still do it. Is that right?

13 MS. LA LUMIA: That's -- that's it in a
14 nutshell.

15 QUESTION: All right.

16 QUESTION: And why isn't (h) instructive at
17 least to that extent, that Congress again used the word
18 revoke? So, we can assume that it -- when it used the
19 word revoke, it meant call back. It meant it in (h) and
20 it meant it in (e)(3).

21 MS. LA LUMIA: The difference is that in -- in
22 (h) Congress gave the specific authority for reimposition.
23 Anything called back in order to --

24 QUESTION: But it's not inconsistent with
25 interpreting the -- the word revoke to mean call back

1 because that's clearly what it means in (h).

2 MS. LA LUMIA: However, in order to undo
3 something, one has to undertake an additional act. In
4 this case, Congress did not provide the authority for
5 undertaking an additional act to undo the -- the
6 revocation in this -- in this situation, and under
7 subsection (h) it did.

8 I'd like to reserve the rest of my time, if I
9 may.

10 QUESTION: Very well, Ms. La Lumia.

11 Mr. Wolfson.

12 ORAL ARGUMENT OF PAUL R.Q. WOLFSON

13 ON BEHALF OF THE RESPONDENT

14 QUESTION: Mr. Wolfson, may I make a suggestion
15 before you start? I think perhaps your opponent didn't
16 have a full time to develop her argument.

17 Supposing the argument were phrased this way,
18 that prison time and supervised release are different
19 animals and that you cannot grant supervised release
20 unless there's specific statutory authority for it and
21 there is no such authority in (e)(3). What's your
22 response to that argument?

23 MR. WOLFSON: I think that it is -- I don't
24 think that you have to have specific authority. Does --
25 the statute does not have to say, and the district court

1 may, in addition, impose a term --

2 QUESTION: But you do agree there's no express
3 authority in (e) (3) for granting supervised release after
4 a revocation.

5 MR. WOLFSON: Well, it depends on how you read
6 (e) (3). I guess I have to come back to that -- to that
7 point.

8 QUESTION: Tell me -- do this for me.

9 MR. WOLFSON: Right.

10 QUESTION: Tell me what the express language in
11 (e) (3) is that authorizes supervised release.

12 MR. WOLFSON: Right. Right. It's to -- it's to
13 -- upon revoking a term of supervised release, it is to
14 require him to serve in prison all or part of the term,
15 all or part of the term of supervised release, without
16 credit for the time previously spent on -- on post-release
17 supervision.

18 Now, what this --

19 QUESTION: In prison.

20 MR. WOLFSON: Right, right, but the -- right.
21 Right, but the --

22 QUESTION: -- served on supervised release.

23 MR. WOLFSON: The question is what happens if he
24 serves part of it -- of the term of supervised release in
25 prison. What happens to the rest of the term of

1 supervised release? That is, the term is not -- the term
2 is not dead. It's still in existence --

3 QUESTION: You're talking about the originally
4 sentenced term, not the authorized term, but the term to
5 -- so, you would agree that you can never sentence him to
6 a new term of supervised release, a new 3-year term if
7 that was the original limit. If he's already served a
8 year of it, the most you can do is put him -- according to
9 your theory, is put him in jail for a year and then 2
10 years of supervised release, which is what would have been
11 left.

12 MR. WOLFSON: Well, you have to bear in mind
13 that he loses credit for time previously spent on the
14 street. So, if he -- and that's in (e)(3). It's in the
15 -- this is on page 3a of our brief. It says --

16 QUESTION: Well, he uses credit --

17 MR. WOLFSON: Right.

18 QUESTION: -- against the jail time for that.

19 MR. WOLFSON: No, no. No.

20 QUESTION: It doesn't say he loses credit
21 against the -- against the future -- in fact, I guess it
22 says nothing about the future supervised release time.

23 MR. WOLFSON: No. I think our argument does
24 assume that he -- that he loses credit for the entire
25 period of time spent on supervised release. So --

1 QUESTION: Both --

2 MR. WOLFSON: -- let's assume that --

3 QUESTION: -- both against prison and against a
4 future supervised release sentence.

5 MR. WOLFSON: Yes, but the total of prison --
6 no, but the total of prison and supervised release under
7 (e)(3), as it existed before, couldn't exceed the time
8 that he was ordered to serve on supervised release
9 initially. So, if he was initially sentenced at his
10 original conviction and sentencing hearing to a 3-year
11 period of supervised release --

12 QUESTION: Right.

13 MR. WOLFSON: -- then he's released from prison
14 and -- and goes out and serves his supervised release.
15 And then he violates his supervised release on 2 years and
16 one-half --

17 QUESTION: Okay.

18 MR. WOLFSON: -- that -- and -- and he's --
19 let's assume that he's revoked immediately, just to
20 simplify. He loses credit for that 2 years and one-half
21 and the 3-year period runs anew. It's exactly as Justice
22 Breyer was saying. You go back essentially to square one.

23 So, then the district court says, what will I do
24 with this 3-year term of supervised release? That is the
25 term of supervised release. And what (e)(3) allows the

1 district judge to do -- the district court to do -- is to
2 order him to serve all or part of it in prison, all or
3 part of the term, and the rest of the term --

4 QUESTION: Where does it authorize him to spend
5 part of it in supervised release? The old sentence of
6 supervised release has been revoked. I assume you need
7 some new authority to prescribe a new term of supervised
8 release. Where did you get that from?

9 MR. WOLFSON: Justice Scalia, I -- I don't think
10 I agree. It's a subtle difference, but I don't think that
11 I agree that it is really a new term of supervised
12 release. The point is that it is -- it is the term of
13 supervised release -- the -- that is basically called back
14 and set anew. So, I don't think that it's -- I think it's
15 incorrect to look at it as though the district court is
16 required to -- to impose a new term of supervised release
17 as the sentence -- as the statute was in effect then.

18 QUESTION: It does -- I wonder -- actually this
19 is a point I had not at all focused on. But let's imagine
20 a person who isn't violating anything. That person was
21 sentenced to 5 years in prison, followed by 1 year of
22 supervised release or 2. Let's say 2 years of supervised
23 release, and he never does anything wrong.

24 Now, I have always thought that under (e)(2),
25 not (e)(3), the prosecutor or someone could come in and

1 say, I'm sorry. I don't think that 2 years is enough. I
2 would like his term extended to 4 years, all within the
3 statute. It's an A felony.

4 MR. WOLFSON: Right.

5 QUESTION: I would have thought that (e)(2),
6 since it gives the authority of the judge to extend, as
7 well as to cut down in the same way, it says, that we used
8 to do that with parole. It says that right in the
9 statute. I would have thought that gave him the authority
10 to extend or cut back or impose new conditions. It's like
11 parole. It's just another word for parole. Now, I
12 thought that that was so, but I'm not positive.

13 MR. WOLFSON: Well, I'm not sure it's just like
14 parole, but -- but if -- if he was initially -- let's
15 suppose it was a class A felony and -- and he could have
16 gotten 5 years of supervised release, but he initially got
17 only 2, and close to the end of his period on supervised
18 release, the prosecutor or the probation office says we
19 think that his record warrants a new -- an extension of
20 the term. Yes. And -- and -- but that's not --

21 QUESTION: That's relevant for this case in the
22 following way. It's relevant to this case because the
23 person who was sentenced to less than the maximum that
24 violated his condition could be called in. The judge
25 would then extend the term to the maximum and then, having

1 done that, revoke it and divide it between prison and
2 supervised release.

3 Now, I'm not -- I'm putting this to you to get
4 your reaction. I'm not certain that that's the right way
5 to read it.

6 MR. WOLFSON: I -- I think that some courts have
7 said that you could look at it that way. I think it would
8 -- but it would depend in some cases on how the math
9 worked, frankly. I mean, in -- in this case he violated
10 -- he violated for 7 months -- 7 months in, but I -- but
11 of course, the judge was proceeding under (h). But --

12 QUESTION: But I think Justice Breyer's example
13 was no violation. They just changed their mind and wanted
14 to up the sentence a little bit.

15 MR. WOLFSON: Right. But I -- but in Justice
16 Breyer's original hypothetical, where he said extend it
17 from 2 -- 2 years to 4 years or 5 years, he's not being
18 sentenced to a new term of supervised release. He's
19 extending a term of supervised release.

20 And my -- I think in the same -- I think one
21 should look at Justice Scalia's question to me in the same
22 way, which is even when his supervised release is being
23 revoked and then he's being -- he's required to spend some
24 time in prison and some new time on supervised release,
25 he's not being sentenced to a new term of supervised

1 release. The term of supervised release is being called
2 back and set as if at the beginning. And that's -- I
3 mean, I think that that's -- you know, one can read the,
4 you know, (2) and (3) sort of -- proceeding roughly along
5 the same lines.

6 QUESTION: But the reason you say that is that
7 it -- I take it, that it would make no sense or it
8 wouldn't make much sense to say that upon revocation the
9 sentence may be to all or even a portion of the original
10 period of supervised release, unless Congress had meant
11 that if the court sentences only to a portion, there would
12 be at least the balance of supervised release to be served
13 as supervised release because that only -- that's the only
14 reading that would be consistent with the theory of what
15 supervised release is there for.

16 MR. WOLFSON: I think that's basically right.
17 That is, when one does interpret this statute, one has to
18 bear in mind what the policies of supervised release are.
19 And it does raise, I think as -- as the First Circuit and
20 the Eighth Circuit and one of the Eleventh Circuit
21 decisions pointed out, why would one want to sort of force
22 a court to choose between sending somebody to prison and
23 -- and following again the policy of supervised release?

24 QUESTION: Well, the -- the answer is pretty
25 easy to that, that you have a tough law and order of

1 Congress that says we want people on supervised release to
2 know that if they revoke -- if they violate a term of --
3 of their condition, their release can be revoked, and they
4 must now do prison time. And that's exactly what the
5 plain language says.

6 MR. WOLFSON: Well --

7 QUESTION: And -- and we don't want -- we don't
8 want some bleeding heart judge to -- to refuse to give
9 them the full time in prison by giving him some of that
10 time back on release which they've just violated.

11 MR. WOLFSON: Well --

12 QUESTION: We don't want that to happen. The
13 only option we're going to give these judges is to send
14 them to prison.

15 MR. WOLFSON: Well, I'm not -- I'm not sure --

16 QUESTION: I mean, that makes some sense. You
17 don't have to agree with it, but it makes sense.

18 MR. WOLFSON: I'm not sure I agree with that,
19 Justice Scalia. First of all, I think if -- if Congress
20 had wanted that approach, one would have expected it to
21 say something like the district judge must revoke his
22 supervised release, and indeed one would have expected
23 that it would have put particular times that the defendant
24 had to serve in -- in prison. But -- but in fact, what it
25 did was it said to the district judge, all or part of it.

1 In the end -- and part of it can be quite -- can
2 be a quite a short amount of time. That is, consider, for
3 example -- and we've cited one case like this in our
4 brief, the case of Cooper. Consider, for example, a
5 defendant who looks as though he's basically going on the
6 right road, but he's having some trouble and he commits a
7 -- a relatively minor but, nonetheless, still serious
8 violation of supervised release. And the district judge
9 says, I think -- I think you need some time back in
10 prison. It's, you know -- it's necessary for you to -- to
11 have a reminder of what prison is like. It's necessary to
12 protect society. You're -- you're sort of -- you've
13 wandered a little bit off the road. But after -- but I
14 don't think that -- I'm not going to give up on you
15 completely, and so I'm going to put you back on supervised
16 release again. That I think is -- that is a very sensible
17 policy, and that is exactly the policy that's lost --

18 QUESTION: No, there's no doubt about that being
19 a very sensible policy. The question is whether the
20 literal reading of the statute is so nonsensical.
21 Frankly, I think it would be unwise to read it that way.
22 But is it so unwise that we can't believe Congress really
23 intended what it said?

24 MR. WOLFSON: I'm not going to --

25 QUESTION: Because the only -- and -- and to

1 answer it, they could have spelled it out, but they could
2 also say, well we've given the judge -- judge his four
3 options in (e) (1), (2), (3), and (4). In option (3), he
4 can really throw the book at him, put him in prison up to
5 the time of -- spent on authorized supervised release.
6 But that's his only option. They -- they could have said
7 that and it would not have been irrational.

8 MR. WOLFSON: I don't think -- I'm not going to
9 argue that it would be an absurd result, but I do think
10 that it is somewhat -- it is a somewhat -- it is a
11 somewhat illogical policy to say that Congress wanted to
12 deny the district court the flexibility to say you should
13 both have some time in prison and some time in supervised
14 release --

15 QUESTION: All they would have had to do was
16 say, to serve in prison or on an additional period of
17 supervised release. Then all the rest would read the same
18 way. That's what they should have --

19 MR. WOLFSON: It could have -- it could have
20 said that.

21 QUESTION: That's what it means.

22 MR. WOLFSON: Right. I agree it could have said
23 that, but it did say -- but I think it did say -- the fact
24 they didn't say all or part of the term of supervised
25 release.

1 QUESTION: -- the language. Yes.

2 MR. WOLFSON: Well, what it -- what it points
3 out, though, I think is that if the district court saw
4 that only a short amount of time in prison was necessary
5 and it gave that to the discretion of the district court
6 -- if only a short amount of time in prison was necessary
7 to sort of get the offender back on the right path, and
8 then after the offender was on the right path, you know,
9 it was time to start the supervised release experiment
10 again, I think that -- that -- that's what Congress
11 intended for -- for district courts to have the
12 flexibility to do.

13 QUESTION: The reason -- the reason you say it
14 would be illogical to deny that, I take it, is that
15 supervised release is supposed to increase the odds of the
16 prisoner succeeding in working his way back into society
17 without further trouble. And -- and it would be illogical
18 to suppose that Congress meant to jettison that policy for
19 somebody in your hypothetical.

20 MR. WOLFSON: I think that's basically right.
21 And I think that in considering that, it's also useful --

22
23 QUESTION: Except that the guy had already
24 forfeited his entitlement to that by violating the
25 conditions once. Why is it irrational to say, you know,

1 we tried to help you out, but you know, you -- you
2 ingrate, you violated the terms of it. We're not going to
3 give you another -- another round of the same thing so you
4 can go -- go off and -- and rob another grocery store, you
5 know, whatever --

6 MR. WOLFSON: Well, the district court does in
7 some cases -- the district court doesn't have to --
8 doesn't have to give him another chance on supervised
9 release. I mean, the district court can order him to
10 serve all of the time in prison, all of the -- the part of
11 the term that remains in prison and not give him any
12 supervised release.

13 So, what -- what the statute does is it says to
14 the district court, here's basically a menu that you can
15 choose from, balancing the various policies of supervised
16 release and deterring the -- deterring the defendant
17 against committing future crimes, protecting the public,
18 but also providing rehabilitation and providing assistance
19 for reintegration into society.

20 Now, here -- excuse me.

21 QUESTION: If we're speaking metaphysically, I
22 guess metaphysically the term of supervised release must
23 still exist, for otherwise how could you serve all or part
24 of it?

25 MR. WOLFSON: I think that's -- that's -- that

1 is what we've argued basically.

2 QUESTION: I think if you're speaking non-
3 metaphysically --

4 MR. WOLFSON: Right, right.

5 QUESTION: -- I guess you have to read into
6 those words about supervised release, former term of
7 supervised release. But if they're saying former term,
8 serve part of it in prison, you could as easily imply and
9 serve the rest of it where he's supposed to spend it, on
10 supervised release.

11 MR. WOLFSON: Well, in this --

12 QUESTION: Are we speaking metaphysically or
13 non-metaphysically or what?

14 MR. WOLFSON: Well, the term -- I think the word
15 term in this situation is used to mean the -- the sanction
16 that was imposed upon the offender, that is, the -- his
17 actual term.

18 I think in this respect, it is also useful to
19 look at the experience under the predecessor forms of --
20 of non-imprisonment monitoring, special parole, parole,
21 and probation, in particular special parole, which took a
22 very similar approach. And supervised release is a -- is
23 a close cousin to special parole.

24 QUESTION: I'm asking that because I think where
25 she's right -- your opponent -- is that you do have to do

1 a little bit of twisting of this language. So -- so, I
2 would guess what is the best non-twisting that you could
3 do and come up with the result that you think -- and I
4 agree with you -- makes sense?

5 MR. WOLFSON: Well, I'm not sure that -- I'm not
6 sure I agree to this point.

7 QUESTION: -- literally.

8 MR. WOLFSON: I'm not sure that I agree it is
9 twisting. I mean, after all, in the O'Neil opinion, the
10 First Circuit said, to read the word term the other way,
11 you really need to say --

12 QUESTION: Yes, but the First Circuit calls upon
13 a meaning of revoke as given by Sheridan approximately,
14 which -- which I think is at least an unusual meaning and
15 other than Sheridan, it might be tough to find examples.
16 Or have you found them?

17 MR. WOLFSON: Revoke means -- I mean, literally
18 of course it means call back, and that's --

19 QUESTION: That's true, but we don't seem to use
20 it in that way. We seem to use it in the sense of call
21 back and cancel, except for this time revoked and so
22 forth.

23 MR. WOLFSON: Well, it is used in that way
24 actually in the predecessor provisions, that is, special
25 parole. I mean, it is used. It's a very similar

1 approach, and I think that that's probably what Congress
2 looked to when it -- when it was thinking about what did
3 the word revoke mean. In the special parole statute, the
4 parole commission had the authority to revoke somebody's
5 special parole and then -- and then he had to serve some
6 period of time in prison after that. And then the parole
7 commission said then you can put him on special parole
8 again.

9 Now, there is a -- there is a conflict as to
10 whether it could impose special parole again, but there's
11 no disagreement among the courts that it could impose at
12 least either parole or special parole after having revoked
13 his special parole the first time. And so, this is --
14 this is the experience that Congress has looked to.

15 Similarly, under the old probation statute, the
16 statute said that the district court may revoke an
17 offender's probation and order to -- him to serve any
18 sentence. And it was recognized that the majority of the
19 courts had certainly held that. What -- when -- once the
20 district court revoked an offender's probation, it could
21 order him to serve another term of probation. It wasn't
22 required -- it wasn't limited to the option of sending him
23 back to jail.

24 And so, this is the -- this is the experience to
25 which Congress was looking when it enacted this statute,

1 and I think it would -- this statute should be interpreted
2 in light of that experience to provide some continuity
3 along those grounds.

4 QUESTION: What do you want us to say about (h)?
5 The less, the better, so far as you're concerned?

6 MR. WOLFSON: The less, the better. I agree. I
7 mean, I think that basically the construction of (h) is
8 not -- is not directly at issue in this case. And as we
9 have pointed out in our brief, the -- the real question is
10 could the district court have done this under (e) before
11 (h) was enacted. So, I think it's -- it's probably best
12 just to look at 3583 --

13 QUESTION: Well, the district court thought it
14 was relying on (h) and that it was going to apply it
15 retrospectively.

16 MR. WOLFSON: The district court -- I agree the
17 district court thought it was relying on (h), but I think
18 nobody doubt -- nobody disputes that what the district
19 court was proper under (h). The -- the question is
20 whether it could have done the same thing under (e)(3) or
21 under (e) as it existed at the time of the offense, (h)
22 not being in the picture and --

23 QUESTION: It does seem to me from one
24 standpoint that if your construction is correct, they
25 would have gone back and -- and amended (h) -- pardon me

1 -- and simply amended sub (3).

2 MR. WOLFSON: Well, they could have done that,
3 but I think obviously they were aware of this conflict and
4 perhaps wanted to make it more clear by putting out --

5 QUESTION: And they did -- and they did change
6 (3).

7 MR. WOLFSON: They changed (3) also. I mean,
8 they made another -- several other amendments to (3).
9 They changed (g).

10 QUESTION: And instead of it being -- the
11 limitation being the period of supervised release
12 originally imposed, it's the statutory maximum that now
13 governs under (e) (3).

14 MR. WOLFSON: That's correct. That's correct.
15 So, I'm not sure I have an answer as to why Congress put
16 it in its own section as opposed to amending (h) -- as
17 opposed to amending (e) (3) -- excuse me --

18 QUESTION: Mr. Wolfson, what about -- what about
19 the rule of lenity? Now that -- now that whatever (3)
20 originally meant doesn't matter, since we have (h), isn't
21 -- doesn't the rule of lenity counsel that we interpret
22 (3) the way petitioner would have it rather than the way
23 you would because hers will -- will come down less hard
24 on --

25 MR. WOLFSON: Well, of course, to invoke the

1 rule of lenity, the Court has to conclude that there is a
2 true ambiguity in the statute and --

3 QUESTION: Oh, you don't think there's a true
4 ambiguity here.

5 MR. WOLFSON: -- and --

6 QUESTION: You argue that your position is not
7 -- is not only right, but it's not even the resolution of
8 an ambiguity?

9 MR. WOLFSON: The -- the Court has to arrive at
10 the conclusion that the statute is truly ambiguous after
11 looking to -- to all of the tools available, including --

12
13 QUESTION: Let's assume I have no trouble with
14 that. Let's assume I have no trouble with the proposition
15 that it is at least -- at least -- ambiguous if not
16 contrary --

17 QUESTION: Your answer I suppose, Mr. Wolfson,
18 is you look at the rule of lenity before a statute is
19 amended. The question is which would be the more lenient
20 reading of (e) (3) without (h) having been subsequently
21 enacted.

22 MR. WOLFSON: I think I have to say that that is
23 -- well, that is -- one has to look at (e) (3) or at (e),
24 the statute at the time that petitioner committed his
25 offense. Obviously, if -- if the Court concluded that the

1 -- that the statute is truly ambiguous and decides to
2 apply the rule of lenity --

3 QUESTION: It's hard not to confuse that --

4 QUESTION: Well, I thought you -- I thought that
5 your answer might have been it is an odd rule of lenity
6 that says that all of these prisoners have to serve in
7 prison and can't get -- and can't get --

8 MR. WOLFSON: Right, right. Well, right. I
9 mean, I think that's -- I mean, there are -- there are
10 certainly circumstances in which not having this option
11 available to the district court hurts the prisoner, or I
12 mean, that is, the district court faced with -- faced with
13 the construction that the petitioner proposes, a district
14 court might very well say, you know, I -- I think it's
15 necessary to impose more prison time.

16 QUESTION: Maybe they would in the case of her
17 client.

18 MR. WOLFSON: Maybe they would. We don't know.
19 I mean, after all, the district court did impose less time
20 in prison than the amount of time it could have even under
21 the old statute, which I think actually confirms again
22 that the district court ought to have at its -- ought to
23 have at its hand all of these available -- all of these
24 available tools.

25 QUESTION: It's no doubt true if you -- if you

1 apply the rule of lenity as of -- as of the time the
2 statute was enacted, but interpreting the statute
3 currently, there is no doubt which interpretation is more
4 favorable to defendants.

5 QUESTION: Really? Why? Why -- why is it
6 not --

7 QUESTION: I think to any defendant. I -- I
8 don't see how any defendant could be disadvantaged by the
9 interpretation that petitioner asserts today. Any
10 defendant today can be --

11 MR. WOLFSON: Well, today -- well, today of
12 course (h) does confirm that the district court has -- has
13 that option, but -- but -- I think that's --

14 QUESTION: Is that right? You know, I mean,
15 this is a part that -- imagine the class of people who
16 were sentenced under this prior to the ones -- the Ex Post
17 Facto Clause. Now, if you sent those back for
18 sentencing --

19 MR. WOLFSON: Right, right.

20 QUESTION: -- and you cut away the option of
21 putting them for 7 months on supervised release, the judge
22 might say, well, I can't give him a supervised release.
23 I'm going to throw him into prison for the 7 months.

24 MR. WOLFSON: Well, that might happen and --

25 QUESTION: So, how do we know which way it will

1 cut?

2 MR. WOLFSON: But I was assuming that -- I was
3 assuming that the question meant suppose somebody
4 committed their offense today with (h) -- with (h) in the
5 picture.

6 QUESTION: The offense date is no problem
7 because --

8 MR. WOLFSON: With (h) -- right.

9 QUESTION: -- but we're only talking about the
10 class of people who committed their offense prior to (h).
11 And as regards that class, I honestly don't know, which is
12 why I'm mentioning it because you may know. I don't know
13 what will happen to that class of people under an
14 interpretation that says the judge can't give them any
15 supervised release but has to either give them
16 imprisonment or nothing.

17 QUESTION: But you -- you would apply (h) to
18 those people even if the offense was committed before (h)
19 was adopted. (h) -- there's no problem in applying (h) to
20 those people today if it -- if it provides more liberal
21 treatment for them. Don't you think that even for
22 offenses committed before (h) was enacted, (h) can be
23 applied nowadays? Is -- is that the Government's position
24 that (h) only applies to prisoners --

25 MR. WOLFSON: No. I mean, our position is that

1 it --

2 QUESTION: -- who committed their offenses after
3 (h) was enacted?

4 MR. WOLFSON: Well, our position in this case is
5 that it was -- it was acceptable to apply (h) because it
6 was -- it was -- even with (h), it's not more onerous than
7 -- than it was -- than the previous law was.

8 QUESTION: No, but (h) is part of a statutory
9 amendment that made (e)(3) more severe because (e)(3)
10 under the new amendment imposes -- authorizes a longer
11 period of imprisonment than (e)(3) under the old statute.

12 MR. WOLFSON: Right. Well, it depends --

13 QUESTION: So, that statute as a whole could, in
14 some cases, be more severe.

15 MR. WOLFSON: It depends on one looks at the
16 amendment that was made to (e)(3) because, after all, what
17 is true is that even before (e)(3) was amended, under the
18 old -- under the old (e)(3), of course, that the limit --
19 there was a limit of the term that was actually imposed.
20 But it -- one has to remember it is also true that under
21 (e)(2), the judge could have extended the term to the
22 statutory maximum, and then it could -- and then it could
23 have been revoked and the entire term -- entire term --

24 QUESTION: Well, that depends on how one reads
25 (e)(2) because (e)(2) doesn't speak in terms of violations

1 of supervised release. And if it did, then you'd have to
2 have a Morrissey against Brewer hearing and all the rest of
3 it.

4 MR. WOLFSON: Well --

5 QUESTION: Either that or it might be double
6 jeopardy to be adding -- imposing a higher sentence later
7 on.

8 MR. WOLFSON: Well, I don't know that the double
9 jeopardy is --

10 QUESTION: There are a lot of problems with --

11 MR. WOLFSON: -- is in the picture.

12 But the point is that I think that the Court
13 should construe (e) -- should construe with respect to (e)
14 -- that's the question before the Court -- in deciding --
15 in deciding whether that -- whether (h) is more onerous.
16 And when the Court looks to what the prior law was, we've
17 relied basically on (e) as it was at the time.

18 QUESTION: Mr. Wolfson, as I read your brief,
19 you were relying specifically on (e)(3) and the reading of
20 that, as Judge Selya did, and you were not infusing this
21 section (e)(2) that was first introduced into this
22 colloquy by Justice Breyer. Your brief seems to
23 concentrate on (e)(3) and the meaning of that.

24 MR. WOLFSON: That's right. The only -- the
25 only point that we -- I mean, except insofar as the

1 statute needs to be construed, you know, as a whole and
2 one has to look at sort of the -- the menu of options that
3 the district court has in considering the policy of the
4 statute. But we do believe that the -- the authority for
5 the district court to do what it could have done under
6 prior law is found in (e)(3).

7 QUESTION: And -- but -- and I think you would
8 have to concede, would you not, that there is some
9 ambiguity, otherwise how could you account for this
10 circuit split that is lopsided the other way?

11 MR. WOLFSON: Well, certainly courts have looked
12 at this different ways, but the -- this Court has said
13 many times that the mere fact that several lower courts
14 have disagreed about the meaning of a criminal statute
15 doesn't necessarily bring to bear the rule of lenity. And
16 I think that the First Circuit's opinion in the O'Neil
17 case presents a rather persuasive explanation of it.

18 I think the problem with -- one of the problems
19 with the other courts is that they -- the other courts'
20 constructions of (e) is that they didn't sort of -- they
21 didn't consider what were the policy objectives behind
22 supervised release, and they also didn't place it in the
23 context of special parole and parole and probation as the
24 First Circuit did very persuasively. And all of those are
25 legitimate tools of statutory construction that this Court

1 should consider before arriving at any conclusion that the
2 statute is ambiguous.

3 If there are no further questions, we would
4 request that the judgement be affirmed.

5 QUESTION: Thank you, Mr. Wolfson.

6 Ms. La Lumia, you have 3 minutes remaining.

7 REBUTTAL ARGUMENT OF RITA LA LUMIA

8 ON BEHALF OF THE PETITIONER

9 MS. LA LUMIA: Thank you.

10 I want to address a couple points. The first
11 one is the point of policy that the Government makes. One
12 must keep in mind that the policy of -- of the imposition
13 of supervised release at initial sentencing may differ
14 from reimposition of supervised release upon revocation,
15 and given that it's more of a punishment for a person's
16 willful failure to abide by the Court's imposed
17 conditions, the petitioner's reading of subsection (e)(3)
18 would make more sense, to allow the court to impose
19 reimprisonment upon revocation.

20 And, in fact, reimprisonment is what triggers a
21 reimposition of supervised release. Under subsection
22 (h) --

23 QUESTION: But under (e)(3), it's clear the
24 court could, if it wanted to, impose additional
25 imprisonment, isn't it? I mean, that isn't what the

1 ambiguity is about.

2 MS. LA LUMIA: Under subsection (e)(3), the
3 court could, indeed, impose reimprisonment, and there --

4 QUESTION: The question is whether it can impose
5 another term of supervised release or more supervised
6 release.

7 MS. LA LUMIA: That's correct. That's correct,
8 at which -- and that -- that is our -- the petitioner's
9 position in this case. There is no authority to reimpose
10 any term of supervised release.

11 QUESTION: So, a judge is faced with the
12 alternative, either you send the guy to prison or he goes
13 free.

14 MS. LA LUMIA: You send him to prison for up to
15 2 years, the statutory limitation under the supervised
16 release statute -- any period in between. And the court
17 can consider factors that would be -- that would make a
18 longer or shorter term of imprisonment appropriate.

19 QUESTION: How about the benefit of supervised
20 release in enabling someone to reintegrate into society?

21 MS. LA LUMIA: Well, if one considers the
22 benefits weighed against the disadvantages, I think that
23 supervised release is clearly more disadvantageous because
24 it -- it imposes a restraint on liberty. The proper
25 comparison --

1 QUESTION: Well, but surely prison is a
2 restraint on liberty too.

3 MS. LA LUMIA: But the proper comparison in this
4 case is not between an imposition of a prison sentence and
5 imposition of supervised release. It's between imposition
6 of supervised release and freedom. And imposition of
7 supervised release, no matter what the policy goals, is
8 much more disadvantageous --

9 QUESTION: I don't why that's the proper
10 comparison because you're denying the district judge under
11 the old law the ability to say I won't send them to prison
12 at all, but I am going to reimpose supervised release.

13 MS. LA LUMIA: Well, that's correct. And -- and
14 even under subsection (h), if a district -- district judge
15 wants to reimpose supervised release, it's only upon
16 imposition of a sentence of imprisonment. That's the way
17 the statute reads. It's only if the judge considers
18 revocation appropriate --

19 QUESTION: Yes, but even I agreed with you about
20 that, you are saying it's got to be the maximum prison.
21 The judge can't divide it up between the two. It's got to
22 be the 2 years in prison, not 1 year in prison, 1 year
23 supervised release.

24 MS. LA LUMIA: Under subsection (e)(3), that's
25 correct.

1 CHIEF JUSTICE REHNQUIST: Thank you, Ms. La
2 Lumia.

3 The case is submitted.

4 (Whereupon, at 1:57 p.m., the case in the above-
5 entitled matter was submitted.)

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CORNELL JOHNSON, Petitioner v. UNITED STATES.

CASE NO: 99-5153

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BY: *Diana M. May*
(REPORTER)