

# The Burger Court Opinion Writing Database

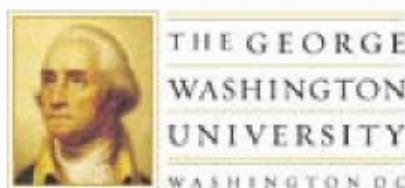
*Bradley v. United States*

410 U.S. 605 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



M

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 14, 1973

Re: No. 71-1304 - Bradley v. U. S.

Dear Thurgood:

Part I of your opinion is fine with me, but I have the same kind of trouble others experience on Part II.

The CA2 treatment of the parole issue would seem to me to be dictum even though the Solicitor General seems to want an "advisory" opinion on it.

Perhaps some discussion at Conference will help clarify the Part II problem.

Regards,

(WSB)

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 26, 1973

Re: No. 71-1304 - Bradley v. United States

Dear Thurgood:

Please join me in your February 21 circulation.

Regards,



Mr. Justice Marshall

Copies to the Conference

*B*  
*AM*  
1st DRAFT

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## SUPREME COURT OF THE UNITED STATES

No. 71-1304

From: Douglas, J.

Circulated: 2-28-73

James B. Bradley, Jr., et al., Petitioners, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit. *Recirculated:* \_\_\_\_\_

[February —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The correct interpretation of the word "prosecutions" as used in § 1103 (a) of the 1970 Act was, in my view, the one given by the Court of Appeals of the Ninth Circuit in *United States v. Stephens*, 449 F. 2d 103, 105:

"Prosecution ends with judgment. The purpose of the section has been served when judgment under the old Act has been entered and abatement of proceedings has been avoided. At that point litigation has ended and appeal is available. *Korematsu v. United States*, 319 U. S. 432, 63 S. Ct. 1124, 87 L. Ed. 1497 (1943). What occurs thereafter—the manner in which judgment is carried out, executed or satisfied, and whether or not it is suspended—in no way affects the prosecution of the case."

The problem of ambiguities in statutory language is not peculiar to legislation dealing with criminal matters. And the question as to how those ambiguities should be resolved is not often rationalized. The most dramatic illustration at least in modern times is illustrated by *Rosenberg v. United States*, 346 U. S. 273, where a divided Court resolved an ambiguity in a statutory scheme against life, not in its favor. The instant case is not of that proportion but it does entail the resolution of unspoken assumptions—those favoring the status quo of prison

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 15, 1973

RE: No. 71-1304 - Bradley v. United States

Dear Thurgood:

Will you please add the following at the foot of  
your opinion, if Part II commands a Court:

Mr. Justice Brennan joins Part I of the  
Court's opinion and would affirm for the  
reasons there expressed. He is also of the  
view that § 1103(a) forecloses the availability  
of parole under both 18 U.S.C. § 4202 and  
18 U.S.C. § 4208(a), and that even if this  
were debatable as to § 4202, that the general  
savings statute, 1 U.S.C. § 109 clearly man-  
dates that conclusion as to that section. He  
therefore does not join Part II of the Court's  
opinion.

Sincerely,



Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 15, 1973

71-1304 - Bradley v. U. S.

Dear Thurgood,

I agree with Part I of your opinion. As to Part II, I could join in a neutral statement leaving the question of parole open as in your circulation of February 14 (subject to Bill Rehnquist's suggestions).

I think, however, that this will only lead in the end to an unnecessary expenditure of time. I am quite sure that we are holding cases involving the parole question for Bradley, and two such cases are on the Conference List for tomorrow: No. 72-837, DeSimone v. United States, and No. 72-5752, Fiore v. United States. If, therefore, we do not decide the question in Bradley, I should suppose we would have little choice but to grant certiorari in one or more of the cases involving the parole issue.

Accordingly, my preference is to decide the parole question now in the Bradley case. I think the question is considerably closer than those dealt with in Part I of your opinion, but I have concluded that Bill Brennan's is the correct view.

Sincerely yours,

*P. S.*

Mr. Justice Marshall

Copies to the Conference

3  
Supreme Court of the United States  
Washington, D. C. 20542CHAMBERS OF  
JUSTICE POTTER STEWART

February 21, 1973

71-1304 - Bradley v. United States

Dear Thurgood,

I am content to go along with your opinion for the Court as circulated today. I would prefer, however, to decide in this case the question of parole under 18 U. S. C. §4202 in the interest of avoiding the need to grant certiorari in another case. On the merits of that question, I agree with Bill Brennan and Byron White.

Sincerely yours,



Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 14, 1973

Re: No. 71-1304 - Bradley v. United States

Dear Thurgood:

I agree with Part I of your opinion but cannot agree with Part II. I had thought the Conference voted the other way and I am still on that side.

Sincerely,



Mr. Justice Marshall

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 15, 1973

Re: No. 71-1304 - Bradley v. United States

Dear Thurgood:

Please add me to Bill Brennan's  
notation at the foot of your opinion in this  
case.

Sincerely,



Mr. Justice Marshall

Copies to Conference

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To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

1st DRAFT

From: Marshall, J.

Circulated: FEB 8 1973

SUPREME COURT OF THE UNITED STATES

No. 71-1304

Recirculated:

James B. Bradley, Jr., et al., Petitioners, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[February —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether a District Judge may impose a sentence of less than five years, suspend the sentence, place the offender on probation, or specify that he be eligible for parole, where the offender was convicted of a federal narcotics offense that was committed before May 1, 1971, but where he was sentenced after that date. Petitioners were convicted of conspiring to violate 26 U. S. C. § 4705 (a) (1964 ed.) by selling cocaine not in pursuance of a written order form, in violation of 26 U. S. C. § 7237 (b) (1964 ed. and Supp. V). The conspiracy occurred in March 1971. At that time, persons convicted of such violations were subject to a mandatory minimum sentence of five years. The sentence could not be suspended, nor could probation be granted, and parole pursuant to 18 U. S. C. § 4202 was unavailable. 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V). These provisions were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, 21 U. S. C. § 801 *et seq.* The effective date of that Act was May 1, 1971, five days before petitioners were convicted.

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To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: Marshall, J.

Circulated: \_\_\_\_\_

No. 71-1304

Recirculated: FEB 14 1973

James B. Bradley, Jr., et al., Petitioners, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[February —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether a District Judge may impose a sentence of less than five years, suspend the sentence, place the offender on probation, or specify that he be eligible for parole, where the offender was convicted of a federal narcotics offense that was committed before May 1, 1971, but where he was sentenced after that date. Petitioners were convicted of conspiring to violate 26 U. S. C. § 4705 (a) (1964 ed.) by selling cocaine not in pursuance of a written order form, in violation of 26 U. S. C. § 7237 (b) (1964 ed. and Supp. V). The conspiracy occurred in March 1971. At that time, persons convicted of such violations were subject to a mandatory minimum sentence of five years. The sentence could not be suspended, nor could probation be granted, and parole pursuant to 18 U. S. C. § 4202 was unavailable. 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V). These provisions were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, 21 U. S. C. § 801 *et seq.* The effective date of that Act was May 1, 1971, five days before petitioners were convicted.

WD

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 14, 1973

Re: No. 71-1304 - Bradley v. United States

MEMORANDUM TO THE CONFERENCE

In light of the fact that there does not appear to be a majority favoring the result reached in Part II of my first draft, I have revised that portion of the proposed opinion, and would appreciate comments on it.

  
T.M.

67

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Circulated: \_\_\_\_\_

No. 71-1304

Recirculated: FEB 21 1973

James B. Bradley, Jr., et al., Petitioners, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[February —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether a District Judge may impose a sentence of less than five years, suspend the sentence, place the offender on probation, or specify that he be eligible for parole, where the offender was convicted of a federal narcotics offense that was committed before May 1, 1971, but where he was sentenced after that date. Petitioners were convicted of conspiring to violate 26 U. S. C. § 4705 (a) (1964 ed.) by selling cocaine not in pursuance of a written order form, in violation of 26 U. S. C. § 7237 (b) (1964 ed. and Supp. V). The conspiracy occurred in March 1971. At that time, persons convicted of such violations were subject to a mandatory minimum sentence of five years. The sentence could not be suspended, nor could probation be granted, and parole pursuant to 18 U. S. C. § 4202 was unavailable. 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V). These provisions were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, 21 U. S. C. § 801 *et seq.* The effective date of that Act was May 1, 1971, five days before petitioners were convicted.

WJD

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 13, 1973

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Bradley v. United States,  
No. 71-1304 (List for March 16, 1973)

All of the cases held for Bradley are appeals from judgments of conviction, or from denials of motions to remand to reconsider the sentence imposed. In the appeals from convictions, petitioners in each case sought a remand to consider the possibility of sentencing under the 1970 Act. (In several of the cases, the issue is phrased in the Court of Appeals as whether it was proper to sentence petitioners "under" the repealed provisions, including the provision barring parole under the general parole statute. I do not believe that the fact that a convicted offender is said by the District Judge or the Court of Appeals to have been sentenced under the repealed provisions affects the legal question of whether the Board of Parole may nonetheless consider him for release on parole at the expiration of one-third of his sentence.)

In this respect, all of these cases are governed by Bradley. As I understand the posture of the cases, none of them present the issue reserved there, whether the saving clause of the 1970 Act, or the general saving clause, prohibits the Board of Parole from considering a narcotics offender sentenced under the prior Act for parole. (In No. 72-837, DeSimone v. United States, the discussion of the Court of Appeals is focussed on the possibility of parole. As I have said, I do not believe that that issue was properly presented by an appeal from conviction and sentencing.)

In No. 71-6687, Page v. United States, and in No. 72-5227, Ortiz v. United States, the sole issue raised is

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whether petitioners are entitled to be considered for sentencing under the provisions of the 1970 Act. They are governed by Bradley. Petitioners in each of the other cases raise a variety of other issues, on which I express no opinion.

  
T.M.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 15, 1973

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Bradley v. United States,  
No. 71-1304 (List for March 16, 1973)

I wish to clarify my position on the disposition of these cases. In No. 71-6687, Page v. United States, and in No. 72-5227, Ortiz v. United States, I intend to vote to deny the petitions.

In the remaining cases I propose to take the following positions:

71-992 - Wollack v. United States DENY  
(also includes Massiah and Rule 24 issues)

71-1210 - Figueroa v. United States DENY  
(also includes speedy trial issue)

71-1479 - Moore v. United States DENY  
(also includes sufficiency-of-evidence issue)

71-6769 - Guridi v. United States DENY  
(also includes issues as to sufficiency of the evidence, use of silence against defendant, and use of prior convictions)

71-6085 - Wooden v. United States DENY  
(also includes issue as to proper course on substantive counts after dismissal of conspiracy count)

72-837 - DeSimone v. United States DENY  
(also includes issue of whether old Act may be used to prosecute conspiracies continuing after its effective date)

72-5300 - Barbara v. United States DENY  
(also includes issue as to propriety of supplemental statement to jury in response to its questions, and an identification issue under Stovall)

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 13, 1973

Re: No. 71-1304 - Bradley v. United States

Dear Thurgood:

I sense the difficulty which Lewis and Bill Rehnquist are experiencing. For the moment, however, and depending on any further writing that may be forthcoming, I am inclined to agree with your opinion.

Sincerely,



Mr. Justice Marshall

cc: The Conference

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 22, 1973

Re: No. 71-1304 - Bradley v. U. S.

Dear Thurgood:

Please join me.

Sincerely,

H. A. B

Mr. Justice Marshall

cc: The Conference

*L*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 8, 1973

Re: No. 71-1304 Bradley v. United States

Dear Thurgood:

I am with you as to Part I, but am in some doubt as to Part II dealing with parole.

My conference notes indicated that eight of us voted to affirm. I was of the opinion at the time that it was an "across the board" affirmation with parole being considered in the same category as probation and suspended sentence.

In any event, I will need to do some further study on this point.

Sincerely,

*Lewis*

Mr. Justice Marshall

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 15, 1973

Re: No. 71-1304 Bradley v. United States

Dear Thurgood:

Your revised draft (No. 2) is in accord with my understanding of the Conference vote, and I am glad to join you.

Sincerely,

*Lewis*

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 15, 1973

No. 71-1304 Bradley v. United States

Dear Thurgood:

I have just seen Bill Rehnquist's note to you of February 14.

I am still "with you," but agree with Bill that perhaps some of the language is not entirely neutral on the question to be left open. If you and Bill could get together on this I would be quite content.

Sincerely,



Mr. Justice Marshall

cc: The Conference

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 22, 1973

Re: No. 71-1304 Bradley v. United States

Dear Thurgood:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 12, 1973

Re: No. 71-1304 -- Bradley v. United States

Dear Thurgood:

My recollection of the vote in conference is the same as Lewis expressed in his recent note to you about your proposed opinion. My present thinking is that I can join Part I of your opinion, but not Part II.

Sincerely,



Mr. Justice Marshall

cc: The Conference

## Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 14, 1973

Re: No. 71-1304 - Bradley v. United States

Dear Thurgood:

At our luncheon table talk about Part II of your opinion in this case the other day, I expressed the view that I would be willing to go along with a draft of that part which simply left the question open. I still think I would be, but I would not be willing to join the present revision in which it seems to me you intimate at least some view on the merits, e.g., the statement at page 6 that "Section 1103(a) leaves unaffected only the availability of parole under the latter provision", and the footnote on the same page of similar purport. I think I could join a Part II which was completely neutral, and left the whole matter for future disposition.

Sincerely,



Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 21, 1973

Re: No. 71-1304 - Bradley v. United States

Dear Thurgood:

Please join me in your opinion for the Court in this case.

Sincerely,

*WM*

Mr. Justice Marshall

Copies to the Conference