

The Burger Court Opinion Writing Database

Warden v. Marrero

417 U.S. 653 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1974

Re: No. 73-831 - Warden v. Marrerro

Dear Bill:

This is not an easy case, as your opinion
reflects, but I think you "have the edge" and I join.

Regards,

WBBS

Mr. Justice Brennan

Copies to the Conference

73-831

centary v. Marrero

, dissenting.

Lower Court
This is
excellent
Dear Sir
W W

For
Mr Justice Braden
W W

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eneral savings statute, 1 U.S.C.

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ed originally in 1871, 16 Stat.

5/3/74

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This savings statute, however, is not in line with the traditional common law rule favoring application of existing law. United States v.

Chambers, 291 U.S. 217 (1934); United States v. Tynen, 11 Wall. 88(1871). See United States v. Schooner Peggy, 1 Cranch 103 (1801);Bradley v. School Board of City of Richmond, ____ U.S. ____ (1974).

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1974

Dear Harry:

Please join me in your dissent in
73-831, Warden v. Marrero.

wd
William O. Douglas

Mr. Justice Blackmun

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Harlan
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice White
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-831

From: Brennan, J.

Circulated: 5/30/74

Recirculated:

Warden, Lewisburg Penitentiary, Petitioner, v. Benigno Marrero. } On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June —, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A now repealed statute, 26 U. S. C. § 7237 (d),¹ provided, *inter alia*, that certain narcotics offenders sentenced to mandatory minimum prison terms should be ineligible for parole under the general parole statute, 18 U. S. C. § 4202.² Section 7237 (d) was repealed, effective May 1,

¹ 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V) provides:

"Upon conviction—

"(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

"(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply."

² 18 U. S. C. § 4202 provides:

"A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackman
Mr. Justice Powell
Mr. Justice Rehnquist

From: [Redacted], J.

Circulated: _____

Recirculated: _____

MEMORANDUM TO THE CONFERENCE

The following are my recommendations in the cases held for
Warden v. Marrero, No. 73-831

No. 73-1404 Warden v. Prieto.

The Fourth Circuit held that respondent drug offenders who had served more than one-third of their mandatory sentences imposed for drug offenses before enactment of the Drug Abuse and Control Act of 1970 were entitled to a declaratory judgment that they were entitled to consideration for parole. Marrero held that the 1970 statute did not repeal the prohibition on parole eligibility under 18 U.S.C. Sec. 4202 in the prior statute. We might therefore reverse the Fourth Circuit outright, citing Marrero, but I recommend that we vacate the judgment and remand for reconsideration in light of Marrero.

No. 73-1209 Parole Board v. Amaya

The Fifth Circuit held that the 1970 statute had repealed the prohibition on parole eligibility under the prior act and reversed the denial by the District Court of a petition for mandamus ordering the U.S. Board of Parole to consider him eligible for consideration for parole pursuant to 18 U.S.C. Sec. 4202. Again we might reverse the Court of Appeals outright citing Marrero, but I recommend that we vacate its judgment and remand for reconsideration in light of Marrero.

No. 73-5860 Arias v. United States

This drug offender was transferred to Community Treatment Center in October 1973, a change in the conditions of confinement and not a parole. The Solicitor General advises however as follows: "If petitioner were to violate the conditions of his release and be returned to prison for service of the rest of his time, the Bureau of Prisons and the Parole Board would consider him eligible for parole on this re-incarceration, by virtue of 18 U.S.C. Sec. 4164 and 18 U.S.C. Sec. 4207. Thus, petitioner is no longer subject to the no-parole provisions of the 1956 Narcotics Act, regardless of this Court's decision in Marrero, and there is no need to defer action on this petition pending that decision." I agree and insofar as this petition was held for Marrero it should be denied.

The petition was also held, however, for Potter's Davis, No. 72-1454, and our disposition should therefore await his views.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 3, 1974

Re: No. 73-831, Warden v. Marrero

Dear Bill,

I am glad to join your opinion for the Court
in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1974

Re: No. 73-831 - Warden v. Marrero

Dear Bill:

I join your opinion in this case.

Sincerely,



Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20542

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 1, 1974

Dear Chief,

I am sorry but I feel that you should reassign
No. 73-831, Warden v. Marrero, to someone else.

As you know my vote at Conference was
conditioned with two question marks. Yesterday, I
re-examined the original circulations in Bradley and,
as I suspected, I was firmly the other way in these
original circulations. The only way I could get a court
was to limit Bradley and to leave open the question
involved in this case. After this re-examination, I no
longer feel "boxed-in." As a matter of fact, I will more
than likely come down the other way in this case regarding
parole rather than the sentencing.

Sincerely,

T. M.
T. M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1974

Re: No. 73-831 -- Warden, Lewisburg Penitentiary v.
Marrero

Dear Harry:

Please join me in your dissent.

Sincerely,

T. M.
T. M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 3, 1974

Dear Bill:

Re: No. 73-831 - Warden v. Marrero

I shall dissent in this case. I have put the enclosed together but shall not circulate it until the majority opinion is out and it is found to center on § 109. What do you think?

Sincerely,

Harry

Mr. Justice Douglas

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 7, 1974

Re: No. 73-831 - Warden v. Marrero

Dear Bill:

I have had this printed up and send you a copy for your files. This is the one you examined in type-written form. I shall not circulate it until the Court's opinion comes around.

Sincerely,



Mr. Justice Douglas

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-831

Warden, Lewisburg Penitentiary, Petitioner,
v.
Benigno Marrero. } On Writ of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[May —, 1974]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I believe that parole ineligibility is not a "penalty" envisioned by, and within the meaning of, the general savings statute, 1 U. S. C. § 109. I therefore dissent. The purpose and thrust of § 109, the pertinent portion of which was enacted originally in 1871, 16 Stat. 432, is to preclude the technical abatement of a prosecution for an offense that was committed before the criminal statute was repealed. *Hamm v. Rock Hill*, 379 U. S. 306, 314 (1964). Quite appropriately, this recognizes that, apart from exceptional circumstances,¹ one who violates the criminal law should not escape sanction if, subsequent to the commission of his criminal act, the law happens to be repealed.

This savings statute, however, is not in line with the traditional common-law rule favoring application of existing law. *United States v. Chambers*, 291 U. S. 217 (1934); *United States v. Tynen*, 11 Wall. 88 (1871). See *United States v. Schooner Peggy*, 1 Cranch 103 (1801); *Bradley v. School Board of the City of Richmond*, — U. S. — (1974). The statute has never been applied by this Court other than to prevent technical abatement

¹ See, e. g., *Hamm v. Rock Hill*, 379 U. S. 306 (1964).

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1974

Dear Bill:

I
this case.

Mr. Justice Brennan

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

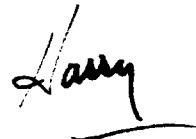
June 3, 1974

Re: No. 73-831 - Warden v. Marrero

Dear Bill:

Inasmuch as the majority opinion, which is now circulating, goes off on both statutes, rather than just 1 U. S. C. § 109, I have found it necessary to expand the proposed dissent. It is at the Printer. You had told me to join you on my first draft, but, with this expansion, I hesitate to presume that I should join you without your specific consent. As a consequence, I list no joinders. Perhaps you will let me know whether you go along with the dissent as so expanded.

Sincerely,



Mr. Justice Douglas

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

3rd DRAFT

From: Blackmun, J.

Circulated: 6/3/74

SUPREME COURT OF THE UNITED STATES

No. 73-831

Recirculated: _____

Warden, Lewisburg Penitentiary, Petitioner, v. Benigno Marrero. } On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June —, 1974]

MR. JUSTICE BLACKMUN, dissenting.

The Court holds that the no-parole provision of the repealed statute, 26 U. S. C. § 7237 (d) (1964 ed., Supp. V), is saved by both the general savings clause, 1 U. S. C. § 109, and the specific savings clause, § 1103 (a), of the 1970 Act. I believe that neither provision can be read to cover postsentencing parole eligibility and I therefore respectfully dissent.

I

Section 109. Parole eligibility, in my view, is not a "penalty" envisioned by, and within the meaning of, the general savings statute, 1 U. S. C. § 109. The purpose and thrust of § 109, the pertinent portion of which was enacted originally in 1871, 16 Stat. 432, is to preclude the technical abatement of a prosecution for an offense that was committed before the criminal statute was repealed. *Hamm v. Rock Hill*, 379 U. S. 306, 314 (1964). Quite appropriately, this recognizes that, apart from exceptional circumstances,¹ one who violates the criminal law should not escape sanction if, subsequent to the commission of his criminal act, the law happens to be repealed.

This savings statute, however, is not in line with the traditional common-law rule favoring application of

¹ See, e. g., *Hamm v. Rock Hill*, 379 U. S. 306 (1964).

STYLISTIC CHANGES

4th DRAFT

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

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

No. 73-831

Circulated:

Warden, Lewisburg Peniten-
tiary, Petitioner,
v.
Benigno Marrero.

On Writ of ~~certiorari~~: 6/12/74
the United States Court
of Appeals for the Third
Circuit.

[June —, 1974]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds that the no-parole provision of the repealed statute, 26 U. S. C. § 7237 (d) (1964 ed., Supp. V), is saved by both the general savings clause, 1 U. S. C. § 109, and the specific savings clause, § 1103 (a), of the 1970 Act. I believe that neither provision can be read to cover postsentencing parole eligibility and I therefore respectfully dissent.

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Section 109. Parole eligibility, in my view, is not a "penalty" envisioned by, and within the meaning of, the general savings statute, 1 U. S. C. § 109. The purpose and thrust of § 109, the pertinent portion of which was enacted originally in 1871, 16 Stat. 432, is to preclude the technical abatement of a prosecution for an offense that was committed before the criminal statute was repealed. *Hamm v. Rock Hill*, 379 U. S. 306, 314 (1964). Quite appropriately, this recognizes that, apart from exceptional circumstances,¹ one who violates the criminal law should not escape sanction if, subsequent to the commission of his criminal act, the law happens to be repealed.

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¹ See, e. g., *Hamm v. Rock Hill*, 379 U. S. 306 (1964).

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1974

No. 73-831 Warden v. Marrero

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1974

Re: 73-831 - Warden v. Marrerro

Dear Bill:

Please join me in the opinion for the Court you have prepared in this case.

Sincerely,



Mr. Justice Brennan

Copies to the Conference