

# 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

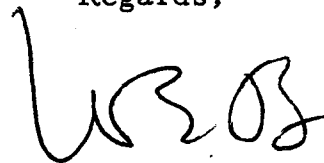
June 6, 1974

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,



Mr. Justice Brennan

Copies to the Conference

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For  
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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.

  
William O. Douglas

Mr. Justice Blackmun

cc: The Conference

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-831

From: Brennan, J.

Circulated: 5/30/74

Recirculated:

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

[June —, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A now repealed statute, 26 U. S. C. § 7237 (d),<sup>1</sup> 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.<sup>2</sup> Section 7237 (d) was repealed, effective May 1,

<sup>1</sup> 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."

<sup>2</sup> 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: Brennan, 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. 20543

✓

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,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Mr. Justice Douglas

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-831

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

[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,<sup>1</sup> 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

<sup>1</sup> 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:

Re: No. 74-631, Winters v. Marrero

I shall shortly prepare a dissenting

this case.

Sincerely,

John

Mr. Justice Brennan

Copies to the Conference

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CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

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

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,

*Larry*

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

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

Circulated: 6/3/74

No. 73-831

Recirculated: \_\_\_\_\_

Warden, Lewisburg Peniten- } On Writ of Certiorari to  
tiary, Petitioner, } the United States Court  
v. } of Appeals for the Third  
Benigno Marrero. } 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,<sup>1</sup> 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

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

STYLISTIC CHANGES

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

No. 73-831

Circulated:

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

On Writ of Certiorari  
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.

I

*Section 109.* Parole eligibility, in my view, is not a  
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traditional common-law rule favoring application of

<sup>1</sup> 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

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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

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