Golden Gate University Law Review

Volume 30
Issue 1 *Ninth Circuit Survey*

Article 9

January 2000

Criminal Procedure - Macfarlane v. Walter

Jennifer Benesis

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggulrev


Part of the Criminal Law Commons

Recommended Citation
Jennifer Benesis, *Criminal Procedure - Macfarlane v. Walter*, 30 Golden Gate U. L. Rev. (2000).
http://digitalcommons.law.ggu.edu/ggulrev/vol30/iss1/9

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

CASE SUMMARIES

CRIMINAL PROCEDURE

MACFARLANE v. WALTER

179 F.3D 1131 (9TH CIR. 1999)

I. INTRODUCTION

In *Macfarlane v. Walter*,[1] the United States Court of Appeals for the Ninth Circuit held that Washington state and county early-release credit systems for prisoners violate the equal protection clause of the United States Constitution.[2] The early-release credit systems unconstitutionally provide fewer early-release credits to pre-trial detainees who cannot afford to post bail than to similarly-situated prisoners who post bail and serve their entire sentences after trial in state prison.[3] The court held that awarding fewer good *behavior* credits for time served in county jail than for time served in state prison denies equal protection of the law to pre-trial de-

---

[1] Macfarlane v. Walter, 179 F.3d 1131 (9th Cir. 1999). The appeal from the United States District Court for the Western District of Washington was argued and submitted on October 5, 1998 before Circuit Judges Otto R. Skopil, Stephen Reinhardt, and Susan P. Graber. The decision was filed May 5, 1999 and amended June 9, 1999. Judge Reinhardt authored the opinion.

[2] *See* U.S. CONST. amend. XIV. ("[N]or shall any State. . . deny to any person within its jurisdiction the equal protection of the laws.").

[3] *See Macfarlane*, 179 F.3d at 1142 (1999).

Published by GGU Law Digital Commons, 2000

tainees who serve part of their sentences in county jail due to lack of funds to post bail, because the court found no relationship between the state's purpose of maintaining prisoner discipline and offering fewer good behavior credits.[4] However, in the case of good *performance* credits, the court held that excluding pre-trial detainees from earning good *performance* credits for participation in work or treatment programs does not deny equal protection of the law because there is a relationship between the state's purpose of preventing flight from prosecution and excluding pre-trial detainees from participating in off-site work or treatment programs.[5]

II. FACTS AND PROCEDURAL HISTORY

Petitioner-appellant Donald Macfarlane was sentenced to concurrent terms[6] of six years for possession of a controlled substance and eight months for assault in the third degree.[7] Petitioner-appellant James Fogle was sentenced to five years for possession of a controlled substance.[8] Both were detained in county jails before their trials and sentencing.[9] Macfarlane

---

[4] *See id.* Good *behavior* credits are automatically awarded to prisoners who have no incidents of misbehavior during a specified number of days. *See id.* at 1135 n.1

[5] *See id.* at 1143. Good *performance* credits can be earned only by participating in work, education, or treatment programs. *See id.* at 1135 n.1

[6] Concurrent terms are two or more prison sentences assessed against the same person but running simultaneously so that the time served is credited to each sentence. A DICTIONARY OF MODERN LEGAL USAGE (Bryan A. Garner ed., Oxford University Press, Inc. 1987).

[7] *See In re Fogle*, 904 P.2d 722, 728 n.1 (1995).

[8] *See id.*

[9] It was not clearly established in the Washington Court of Appeals or Washington Supreme Court why Macfarlane and Fogle did not post bail. The Washington Supreme Court noted that "both defendants were held on separate fugitive warrants," which may have rendered them ineligible for bail. *See id.* at 726. However, on a petition for discretionary review, the Washington Supreme Court was compelled to construe the facts in the light most favorable to petitioners and, therefore, accepted their contention that they were detained pre-trial solely for lack of funds to post bail. *See id.* It was more favorable to petitioners' position for the court to accept indigence as the basis for their pre-trial detention because the disparate treatment of pre-trail detainees based on poverty warranted intermediate scrutiny rather than mere rational basis review. *See In re Mota*, 788 P.2d 538, 543 (1990). Respondent county jails

spent 144 days in Clark County Jail, and Fogle spent 102 days in Pierce County Jail.[10] Because the county jails offered fewer early-release credit than state prisons, Macfarlane and Fogle earned fewer early-release credit in county jail than they would have earned if they had posted bail and served their entire sentences post-trial in state prison.[11]

Based on the discrepancy in early-release credit, Macfarlane and Fogle filed personal restraint petitions with the Washington Court of Appeals.[12] The petitioners alleged that they were being held in prison illegally, in violation of the equal protection clause.[13]

A criminal sentence must be credited one day for each day the defendant actually served before trial.[14] Further, the Washington statute allows a criminal sentence to be reduced by credits earned for good behavior and for good performance.[15] Early-release credits for good behavior and good performance are calculated differently by the state prisons, operated by the

---

did not challenge the Washington Supreme Court's assumption that petitioners were detained pre-trial solely due to lack of funds to post bail and thus could not challenge the assumption on appeal. *See* Macfarlane v. Walter, 179 F.3d 1131, 1136 n.5 (9th Cir. 1999).

[10] *See Fogle*, 904 P.2d at 725.

[11] *See* Macfarlane v. Walter, 179 F.3d 1131, 1136 (9th Cir. 1999).

[12] *See id.* at 1137. The Latin phrase *habeas corpus*, means: "you should have the body," a personal restraint petition requests the court to determine whether the petitioner's imprisonment is illegal. BLACK'S LAW DICTIONARY (Bryan A. Garner ed., West Publ'g Co. 1996).

[13] *See Macfarlane,* 179 F.3d at 1137.

[14] *See Fogle*, 904 P.2d at 725 (citing In re Williams, 853 P.2d 444 (1993)).

[15] *See* Washington Sentencing Reform Act of 1981, Wash. Rev. Code 9.94A.150(1) ("The earned early release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction."). Good behavior credits are automatically awarded to prisoners who have no incidents of misbehavior during a specified number of days. Prisoners receive the maximum good behavior credits unless they lose credits for misbehavior. In contrast to the automatic good *behavior* credits, prisoners earn good *performance* credits only for proactive participation in work, education, or treatment programs. *See Macfarlane,* 179 F.3d at 1135 n.1.

Washington Department of Corrections (DOC), than they are by the county jails, operated by local county governments.[16]

The DOC awards state prisoners one day of good *behavior* credit for every three days served, with a possible reduction of up to one quarter of the sentence.[17] The DOC also awards state prisoners up to one day of good *performance* credit for every six days served if they participate in work, education, or treatment programs.[18] Good behavior and good performance credits are then combined to allow total early release credits up to the statutory maximum of one third of the sentence.[19]

In contrast to the twenty-five percent good behavior credits available to state prisoners, the Clark and Pierce County jails only offered good behavior credits up to fifteen percent of the sentence.[20] Moreover, pre-trial detainees in Clark and Pierce County jails were completely ineligible for good performance credits.[21] The discrepancy resulted in state prisoners earning early-release credit at nearly twice the rate of county pre-trial detainees.[22]

Macfarlane and Fogle both earned maximum good behavior credit while in county jail, one day of credit for every 5 2/3 days

---

[16] The Washington Sentencing Reform Act of 1981 provides that "earned early release time shall be for good behavior and good performance, *as determined by the correctional agency having jurisdiction.*" Wash. Rev. Code 9.94A.150(1) (emphasis added). *See Macfarlane* at 1135.

[17] *See Macfarlane*, 179 F.3d at 1135.

[18] *See id.*

[19] *See* Wash. Rev. Code 9.94A.150(1).

[20] *See Macfarlane*, 179 F.3d at 1135-1136. A 15% reduction translates into fifteen days of good behavior credit for every eighty-five days served, or a ratio of one day earned for every 5 2/3 days served compared with the state prison good behavior ratio of one day earned for every three days served. The Ninth Circuit decision noted that Pierce County has since brought its good behavior policy into conformity with the DOC so that inmates are now eligible for good behavior credits of up to 1/3 of their sentence. *See id.* at 1135 n.2.

[21] *See id.* at 1136. Pre-trial detainees in Clark and Pierce County jails were not allowed to participate in work programs and were thus prevented from earning any good performance credits.

[22] *See id.*

of good behavior.[23] If Macfarlane and Fogle had served their entire sentences post-trial in state prison, they would have earned one day of credit for every three days of good behavior.[24] Thus, if Macfarlane had been able to post bail and serve his entire sentence post-trial in state prison, he would have been released from custody twenty-seven days sooner.[25] Fogle would have been released from custody seventeen days sooner had he served his entire sentence post-trial in state prison.[26]

Macfarlane and Fogle filed personal restraint petitions with the Washington Court of Appeals alleging that the early-release credit policies governing pre-trial detainees denied them equal protection of the law.[27] The Court of Appeals granted Fogle's petition.[28] However, the court denied Fogle's

---

[23] *See Macfarlane*, 179 F.3d at 1136. Macfarlane served 144 pre-sentence days with good behavior at the rate of one day of credit for every 5 2/3 days of good behavior. Thus, the county jail should have awarded Macfarlane 25 days of early-release credit. Macfarlane was awarded only 21 days of early-release credit. Although Macfarlane did not challenge the county jail's calculation of 21 days, the Ninth Circuit noted that 21 days was a miscalculation. Macfarlane should have received 25 days of early-release credit for 144 days of good behavior. *See id.* at 1136 n.7. Fogle served 102 pre-sentence days with good behavior at the rate of one day of credit for every 5 2/3 days of good behavior. Thus, the county jail should have awarded Fogle 18 days of early-release credit. Fogle was first awarded only 15 days of early-release credit. After Fogle challenged the county jail's original award, the Washington Court of Appeals awarded him 17 days, but this calculation was also incorrect. The Ninth Circuit noted that Fogle should have received 18 days of early-release credit for 102 days of good behavior. *See id.* at 1136 n.6.

[24] *See Macfarlane,* 179 F.3d at 1135.

[25] *See id.* Macfarlane would have earned 48 days of credit for 144 days of good behavior in state prison, instead of the 21 days' credit he received from county jail, a difference of 27 days.

[26] *See id.* Fogle would have earned 34 days of credit for 102 days of good behavior in state prison, exactly twice as much early-release credit as the 17 days he earned in county jail.

[27] *See id.* at 1137. Macfarlane and Fogle claimed that the state denied them equal protection of the law by denying them the opportunity to earn early-release credits of up to 1/3 of their sentences on par with their counterparts in state prison.

[28] *See Fogle*, 904 P.2d at 725. Fogle's petition was granted because of Pierce County jail's erroneous calculation of 15 days' early-release credit for 102 days of good behavior. Even the Court of Appeals miscalculated the credit, awarding Fogle only 17 days' credit, still one day short of the 18 he was due. *See Macfarlane*, 179 F.3d at 1136 n.6.

equal protection claim because county jails have statutory authority to develop and implement early-release policies.[29] Fogle petitioned the Washington Supreme Court for discretionary review.[30]

The Washington Supreme Court granted Fogle's petition and certified Macfarlane's petition, which had not yet been decided by the court of appeals.[31] The court subjected Macfarlane's and Fogle's equal protection claims to intermediate scrutiny, which it reluctantly conceded was merited by the wealth-based classification.[32] The Washington Supreme Court found no equal protection violation.[33]

---

[29] *See Macfarlane*, 179 F.3d at 1137. Pursuant to The Washington Sentencing Reform Act of 1981, "procedures . . . shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined." Wash. Rev. Code 9.94A.150(1).

[30] *See id.*

[31] *See id.*

[32] *See In re Mota*, 788 P.2d 538, 543 (1990) (citing State v. Phelan, 671 P.2d 1212 (1983)). Intermediate scrutiny was the appropriate standard of review based on the Washington Supreme Court's prior decisions that people who are deprived of a liberty interest due to indigency comprise a semi-suspect class. A semi-suspect class is a group that is sometimes subjected to invidious discrimination based on unfounded stereotypes, thus deserving more than mere rational basis review, but is at other times subjected to disparate treatment based on actual characteristics that the state may legitimately recognize, thus deserving less than full-blown strict scrutiny. Intermediate scrutiny requires that any disparate treatment of members of a semi-suspect class must be substantially-related to an important government objective. *See generally* Craig v. Boren, 427 U.S. 190 (1976). The Washington Supreme Court determined that in some cases the poor are a semi-suspect class: "The poor, while not a suspect class, are not fully accountable for their status." *See In re Mota* at 543 (citing State v. Phelan, 671 P.2d 1212 (1983)). "Situations involving discrete classes not accountable for their status invoke intermediate scrutiny." *See id.* (citing Plyler v. Doe, 457 U.S. 202 (1982)).

[33] *See id.* The Washington Supreme Court held that the disparate treatment of pre-trial detainees was justified by the state's important interest in "maintaining prisoner discipline, particularly by preventing flight from prosecution and preserving local control over jails." The Court also found no due process violation, because the county jails established and followed written early-release policies consistent with due process requirements. *See id.* at 727. Nor were petitioners put at risk of double jeopardy, because their claims of multiple punishment could not be supported just by speculation that more early-release credits might have been earned under a different system. *See id.* (citing State v. Phelan, 671 P.2d 1212 (1983)).

Upon denial of their state personal restraint petitions, Macfarlane and Fogle filed habeas corpus petitions in the United States District Court for the Western District of Washington in August 1996.[34] Their petitions were again consolidated.[35] The respondent county jails moved for summary judgment.[36] The district court granted summary judgment, holding that intermediate scrutiny was the appropriate standard under federal law.[37] Macfarlane and Fogle appealed the summary judgment to the Ninth Circuit Court of Appeals.[38]

III. THE NINTH CIRCUIT'S ANALYSIS

Pursuant to the Federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Ninth Circuit could not grant Macfarlane's and Fogle's petitions for Federal habeas corpus relief unless the Washington Supreme Court's decision on their state personal restraint petitions was contrary to, or an unreasonable application of, clearly established Federal law as determined by the United States Supreme Court.[39] The Ninth Circuit found the Supreme Court decision in *Bearden v.*

---

[34] *See Macfarlane*, 179 F.3d at 1137. A petition for *habeas corpus*, a Latin phrase meaning "you should have the body," is brought by a prisoner and requests an audience before the court for the purpose of determining whether the petitioner's imprisonment is illegal. BLACK'S LAW DICTIONARY (Bryan A. Garner ed., West Publ'g Co. 1996).

[35] *See id.*

[36] *See id.*

[37] *See id.* at 1137-1138. Because the Washington Supreme Court applied intermediate scrutiny, the U.S. district court assumed the decision was consistent with clearly established federal law in *Bearden v. Georgia*, which also applied intermediate scrutiny. *See Bearden*, 461 U.S. 660 (1983).

[38] *See id.* at 1138.

[39] *See* Macfarlane v. Walter, 179 F.3d 1131, 1138 (9th Cir. 1999). The Antiterrorism and Effective Death Penalty Act amended 28 U.S.C.A. §2254(d)(1) to provide: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C.A. §2254(d)(1).

Georgia[40] to be clearly established Federal law. Although the defendant in *Bearden* was incarcerated for defaulting on a fine, rather than for failing to post bail, the Ninth Circuit in *Macfarlane* reasoned that both situations involve indigent criminal defendants subjected to incarceration where wealthier criminal defendants would not be.[41] Thus, the Ninth Circuit held that the balancing test in *Bearden* governs whether incarceration imposed solely for lack of financial resources violates equal protection of the law.[42]

In accordance with *Bearden*, a court must weigh four factors when faced with an equal protection claim alleging disparate treatment by the criminal justice system due to indigency: first, the nature of the individual interest affected; second, the extent to which the individual interest is affected; third, the rationality of the connection between legislative means and purpose; and fourth, the existence of alternative means for effectuating the purpose.[43] Here, because Macfarlane and Fogle were subjected to longer periods of incarceration, the individual interest affected is liberty.[44] Because physical liberty is a fundamental interest protected by the United States Constitu-

---

[40] Bearden v. Georgia, 461 U.S. 660, 662-663 (1983). The defendant in *Bearden* was sentenced to probation, payment of a fine, and restitution after pleading guilty to burglary and theft by receiving stolen property. He defaulted in payment of the fine and restitution because he was indigent. The court found he had no income or assets during the period when payments were due, and he was unable to find work despite bona fide efforts. The defendant's probation was revoked for failure to pay the fine and restitution, and he was sentenced to serve the duration of his probation in prison. The Georgia Court of Appeals found no equal protection violation in imprisoning Bearden for failure to pay the fine, and the Georgia Supreme Court denied review. *See Bearden,* 461 U.S. at 662-663. The United States Supreme Court reversed, holding that imprisonment of a probationer solely for financial inability to pay a fine is unconstitutional unless no alternate means exist to meet the state's interest in crime punishment and deterrence. *See id.* 461 U.S. at 672.

[41] *See Macfarlane,* 179 F.3d at 1139.

[42] *See id.* at 1140.

[43] *See id.* at 1139 (citing Bearden v. Georgia, 461 U.S. 660, 666 (1983)). *See also* Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring).

[44] *See Macfarlane,* 179 F.3d at 1141. *See also* U.S. CONST. amend. XIV.

tion, depriving someone of liberty *to any extent* in violation of the Constitution is intolerable.[45]

The State of Washington asserted that county jails need different good *behavior* credit systems than state prisons to maintain prisoner discipline and preserve local control of county jails.[46] However, the Ninth Circuit found no rational connection between the discrepancy in good *behavior* credits and maintaining prisoner discipline.[47] Further, prisoner discipline is already maintained by alternative means.[48] The Ninth Circuit also found no rational connection between the discrepancy in good *behavior* credits and preserving local control of county jails.[49] Instead of certifying the number of early-release credits a pre-trial detainee earned in county jail, local authorities could certify the total number of days spent in county jail and the number of days of good behavior.[50] Once the prisoner is transferred to state prison, the DOC could award early-release credits for the number of days of good behavior in county jail.[51] The Ninth Circuit thus ordered the Washington Department of Corrections to calculate the number of good *behavior* credits Macfarlane and Fogle would have received un-

---

[45] *See Macfarlane*, 179 F.3d at 1141. *See also* U.S. CONST. amend. XIV.

[46] *See Macfarlane*, 179 F.3d at 1141-1142.

[47] *See id.* at 1142. The Ninth Circuit noted that the goal of maintaining prisoner discipline through good behavior would rationally be advanced by offering *more* good behavior credits, or at least by offering *equal* good behavior credits to all inmates. The goal of maintaining prisoner discipline was not advanced by offering *less* good behavior credits to pre-trial detainees. *See id.*

[48] *See id.* Good behavior credits already achieve prisoner discipline, not because of the way the credits are calculated, but because credits are awarded to prisoners who demonstrate good behavior and are denied to prisoners who misbehave. *See id.*

[49] *See id.* The Ninth Circuit reasoned that, since pre-trial detainees will be transferred to state prison if convicted, the amount of good behavior credits inmates ultimately receive after transfer to state prison has no affect on local control of county jails. County jails determine what constitutes good behavior and whether a pre-trial detainee in their custody has earned it, but they have no rational interest in the total number of good behavior credits an inmate receives after being transferred to state prison. *See id.*

[50] *See id.*

[51] *See Macfarlane*, 179 F.3d at 1142. The credits would be calculated using the DOC early-release credit system that applies to state prisoners. *See id.*

der the state prison system and to reduce their sentences by that amount.[52]

The State of Washington also asserted that county jails need different good *performance* credit systems than state prisons to protect community safety, preclude risk of flight, and, again, to preserve local control of county jails.[53] The Ninth Circuit found a strong rational connection between the State's concerns and the good *performance* policies excluding pre-trial detainees from participation in off-site programs.[54] Further, the Ninth Circuit found no practicable alternative means to protect community safety and preclude risk of flight while allowing pre-trial detainees to participate in off-site programs.[55] Therefore, the Ninth Circuit held that denial of good *performance* credits to pre-trial detainees in county jail does not violate the equal protection clause.[56] Macfarlane and Fogle thus did not receive adjustments to their sentences for good *performance* credits they might have earned in county jail.[57]

IV. IMPLICATIONS OF THE DECISION

The Ninth Circuit decision seems just in light of its choice of *Bearden* as controlling law. However, other circuits that have decided similar equal protection claims have not found

---

[52] *See id.* at 1143.

[53] *See id.*

[54] *See id.* The Ninth Circuit recognized that excluding pre-trial detainees from work, education, or treatment programs away from jail is rationally related to community safety because pre-trial detainees comprise a more dangerous prison population than post-trial county jail inmates who were sentenced for relatively minor crimes. Not allowing pre-trial detainees to participate in off-site programs is also rationally related to mitigating risk of flight, as pre-trial detainees may be more likely to risk an escape than post-trial county jail inmates serving relatively short sentences. Finally, unlike the counties' good *behavior* policies, the good *performance* policies are rationally related to preserving local control because good performance credits are earned by participating in work, education, or treatment programs which are funded and administered locally.

[55] *See id.*

[56] *See Macfarlane,* 179 F.3d at 1143.

[57] *See id.*

Bearden to control.[58] The First and Tenth Circuits found *McGinnis v. Royster*[59] to control the issue of whether denying good behavior credits to pre-trial detainees violates equal protection.[60] Based on the rational basis test used in *McGinnis,* both the First and Tenth circuits held that denying good be-

---

[58] *See Lemieux v. Kerby*, 931 F.2d 1391 (10th Cir. 1991). In *Lemieux*, a state prisoner's Federal habeas corpus petition claimed that New Mexico's sentencing scheme violated equal protection by denying good behavior credits to pre-trial detainees too poor to post bail. *See id.* at 1392. The alleged equal protection violation was similar to that alleged in *Macfarlane*, except that New Mexico completely denied both good behavior and good performance credits to pre-trial detainees, whereas Washington offered less good behavior credits and completely denied only good performance credits to pre-trial detainees. *See id.* The Tenth Circuit held that New Mexico's asserted purpose of offering good behavior and good performance credits in order to rehabilitate criminals was rationally related to denying credits to pre-trial detainees because rehabilitation is not warranted until after a person has been convicted. *See id.* at 1393. The court based its decision on *McGinnis v. Royster*, where the United States Supreme Court held that an equal protection claim brought by pre-trial detainees who were denied good behavior credits for their presentence incarceration was subject only to rational basis scrutiny and that the state's interest in rehabilitating criminals was rationally related to reserving good behavior credits as a tool of post-sentence rehabilitation. *See McGinnis v. Royster*, 410 U.S. 263, 270-273 (1973). In *Lemieux*, the Tenth Circuit specifically rejected the petitioner's assertion that *McGinnis* was overruled by *Bearden*. *See Lemieux* at 1393 n.4. *See also Chestnut v. Magnusson*, 942 F.2d 820 (1st Cir. 1991). In *Chestnut*, the First Circuit applied *McGinnis* to an equal protection claim brought by an indigent pre-trial detainee and held that Maine's denial of good behavior credits to pre-trial detainees did not violate equal protection. *See id.* at 824. The court specifically stated that indigency does not create a class calling for strict scrutiny. *See id.* Although *Lemieux* and *Chestnut* were both decided well after *Bearden*, it is significant that neither decision found *Bearden* to be applicable.

[59] McGinnis v. Royster, 410 U.S. 263 (1973).

[60] *See McGinnis*, 410 U.S. at 270-273. In *McGinnis*, the United States Supreme Court decided an equal protection claim brought by pre-trial detainees who were denied good behavior credits for pre-sentence time served in county jail. Based on New York's asserted purpose of awarding good behavior credits as part of its criminal rehabilitation program, the Court held it was rational to deny credits to pre-trial detainees because no systematic rehabilitation programs exist in county jails, and detainees merely awaiting trial should not be subject to rehabilitation. *See id.* Notably, the *McGinnis* decision seems not to be based on indigency. Although the prisoners in *McGinnnis* were unable to post bail, and they alleged they were treated differently than "those fortunate enough to obtain bail prior to sentence," the Court framed the issue in terms of whether denying good behavior credits for time served before trial "violates the equal protection of the laws and discriminates against those state prisoners unable to afford *or otherwise qualify for* bail prior to trial." *See McGinnis,* 410 U.S. at 268. (emphasis added). Without basing its decision on indigency, there was no reason for the Court to apply any test other than rational basis scrutiny. *McGinnis* also was not a Federal habeas corpus petition, so no statement of clearly established law was required. *See McGinnis,* 410 U.S. at 265 n.2.

havior credits to indigent pre-trial detainees does not violate equal protection.[61]

Among the Federal Courts of Appeals, the Ninth Circuit stands alone in citing *Bearden* to hold that an early-release credit system offering less good behavior credits to indigent pre-trial detainees violates equal protection of the law.[62] The Ninth Circuit's divergence from other circuits leads one to believe that there is no controlling law.

The threshold question in a federal habeas corpus proceeding brought by a state prisoner is whether the prior decision in the state court habeas proceeding was contrary to "clearly established federal law, as determined by the Supreme Court of the United States."[63] Inconsistency among the federal circuits

---

[61] *See McGinnis*, 410 U.S. at 270. The Court did not recognize a suspect class and held that the "determination of an optimal time for parole eligibility . . . require[s] only some rational basis to sustain [it]."

[62] The Ninth Circuit cites *Bearden* as controlling law on the issue of whether awarding less early-release credits to pre-trial detainees in county jail than to other state prisoners violates equal protection of the law. *See* Bearden v. Georgia, 461 U.S. 660 (1983). Other circuits cite *McGinnis v. Royster* as controlling law on the same issue. In *Bearden*, the Supreme Court applied intermediate scrutiny to an equal protection claim based on indigency and held that revoking probation solely for financial inability to pay a fine violates equal protection of the law. Like *Macfarlane*, the decision in *Bearden* was based on indigency, but *Bearden* was not about awarding less early-release credits to pre-trial detainees. *See Bearden*, 461 U.S. at 672. *McGinnis*, however, was an equal protection claim brought by pre-trial detainees who were denied good behavior credits for pre-sentence time served in county jail. *See McGinnis*, 410 U.S. at 264-265. Although the facts were similar to those in *Macfarlane*, the Supreme Court in *McGinnis* did not base its decision on indigency. *See McGinnis*, 410 U.S. at 268. Finding no suspect class, the Court applied the rational basis test and held that denying good behavior credits to pre-trial detainees who had not yet been convicted of a crime was rationally related to the state's purpose of awarding good behavior credits only as part of its criminal rehabilitation program. *See McGinnis*, 410 U.S. at 268-273. The choice between *Bearden* or *McGinnis* as controlling law thus appears to depend on whether the issue is framed as denial of early-release credits to *indigents* who cannot afford to post bail, or denial of early-release credits to *pre-trial detainees*, whether their inability to post bail is due to indigency or to some other reason.

[63] *See* 28 U.S.C.A. §2254(d)(1). ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as

as to which Supreme Court case is clearly established law undermines any threshold determination that the state court decision was contrary to clearly established law. It would not be unreasonable for a state to argue that there is no clearly established federal law, and therefore, the federal habeas corpus petition should fail. The Supreme Court should swiftly intervene due to the inconsistent decisions within the circuits. Until the Supreme Court intervenes to decide which circuit is correct, it remains to be seen whether *Bearden* or *McGinnis*, or neither, is clearly established federal law on the issue of whether there is an equal protection violation when less early-release credits are awarded to pre-trial detainees who spend time in county jail because they cannot afford to post bail.

Jennifer Benesis[*]

---

determined by the Supreme Court of the United States . . . ").

[*] J.D. Candidate 2001, Golden Gate University School of Law