No. _____

IN THE

Supreme Court of the United States

Clark L. Stuhr,
Petitioner

v.

PATRICK GLEBE,
Respondent

On Petition For Writ of Certiorari
To the Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Clark L. Stuhr
R-B H-1 Upper
Washington Corrections Center
Shelton, WA 98584

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QUESTION PRESENTED

Is a Criminal Defendant Entitled to a Certificate of Appealability When it is Demonstrated that a Substantial Showing of the Denial of Constitutional Right's Has Occurred?

Opinions Below

The opinion of the Ninth Circuit Court of Appeals Unpublished Opinion appears at Appendix "A"

The opinion and judgment of the U.S. District Court appears at Appendix "B"

The opinion of the U.S. Magistrate on Report and Recommendation appears at Appendix "C"

The Ninth Circuit Court of Appeals Order Denying Reconsideration appears at Appendix "D"

Jurisdiction

The District Court and Court of Appeals for the Ninth Circuit denied Petitioner's request for a Certificate of Appealability. In Hohn v. United States, 524 U.S. 236 (1998), this Honorable Court held that, pursuant to 28 U.S.C. §1254(1), the United States Supreme Court has jurisdiction, on Certiorari., to review a denial of a request for a Certificate

of Appealability by a circuit judge or panel of a Federal Court of Appeals.

This petition is timely filed pursuant to 28 U.S.C. § 2101(c).

Statutory and Constitutional Provisions

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 U.S.C. §2254. The standard for relief under "AEDPA" is set forth in 28 U.S.C. §2254(d)(1).

The Fourteenth Amendment of the United States Constitution is hereby invoked which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner raised 2-two due process claim's before the district court; (1) Unlawful revocation of Good Time Credits; (2) Denial of Documentary Evidence at a prison disciplinary hearing. The district court reached the merits of both claims

but ruled that the state court's decision was not contrary to or an unreasonable application of U.S. Supreme Court precedent. The District court ultimately dismissed the petition with prejudice and denied a COA.

The Ninth Circuit also denied a request for a COA, and held that petitioner had not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would not find it debatable whether the district court was correct in its ruling". For the reasons which follow, petitioner respectfully requests that Certiorari be Granted.

REASONS FOR GRANTING CERTIORARI

I. THE NINTH CIRCUITS DECISION DENYING A CERTIFICATE OF APPEALABILITY CONFLICTS WITH PREVIOUS DECISIONAL LAW OF THIS COURT.

There is a direct conflict between what the Ninth Circuit Panel decision held in this case, and what this Court has held in other cases analyzing when a criminal defendant is entitled to a certificate of appealability.

A. SUPREME COURT PRECEDENT ON STANDARD FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY.

U.S. Supreme Court decisional law as dictated in Miller-El v. Cockrell, 123 S.Ct. 1029 (2003),

clarified the standards for issuance of a COA:

> ... A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right." A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further.

Id., 123 S.Ct. at 1034. The test is met where the petitioner makes a showing that "the petition should have been resolved in a different manner or that the issues presented are 'adequate to deserve encouragement to proceed further'" Id., at 1039.

This means that petitioner does not have to prove that the district court was necessarily "wrong" - just that its resolution of the constitutional claim is "debatable":

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that the petitioner will not prevail. As we stated in Slack, where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Miller-El, Id.

This Court further emphasized in Buck v. Davis, 137 S.Ct. 759 (2017), that the initial determination for whether a COA should be granted is simply 'whether a claim is reasonably debatable, and if so, an appeal is the normal course.

In this case, the Ninth Circuit denied a COA by holding that petitioner's claims did not make a showing of the denial of a constitutional right, however, based on the following argument it is clear that the Ninth Circuits reasoning for denying a COA is in conflict with this Court's precedent.

*** PETITIONERS GOOD TIME CLAIM MEETS THE SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT. 28 U.S.C. §2253(c).

(a) Supreme Court Precedent on Good Time Credits

The U.S. Supreme Court recognizes that protected liberty interests can be created by: (1) the Due Process Clause on its own force; (2) a court order, and (3) state and federal statutes and regulations. Sandin v. Connor, 515 U.S. 472, 483-84 (1995). A prisoner claiming deprivation of state-created liberty interest must specify what regulation or statute created the interest. A court will only afford due process protection to an alleged state created-interest if the interest's restriction or deprivation either (1)

creates an "atypical and significant hardship" by subjecting the prisoner to conditions much different from those ordinarily experienced by large numbers of inmates serving their sentences in the customary fashion, or (2) inevitably affects the duration of the prisoner's sentence. Sandin, 515 at 487.

Once the state has created the right to good-time credits and has recognized that deprivation of such credit is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that the state-created right is not arbitrarily abrogated. Wolff v. McDonnell, 418 U.S. 539, 557, HN 11 (1974).

This Court in Sandin, reaffirmed its earlier holding that good-time, which was conferred by state statute and could only be revoked on a finding that the prisoner had committed serious misconduct, was an interests of "real substance" protected by due process. Id., 515 U.S. 477-78; (citing Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

The clearly established U.S. Supreme Court precedent here is Sandin, Wolff, Fouchcia, Dent, Wilkinson, and Weaver. These Supreme Court cases, contrary to the U.S. magistrates, and Ninth Circuits findings establish a "liberty interest" in good time credits, and support a finding that the state court's determined petitioner's claim contrary to, and unreasonably to those U.S. Supreme Court decisions. Id. Moreover, the state court's failed to apply those U.S. Supreme Court principle's to petitioner's case. Price, 538 U.S. at 640. Also see Lockyer v. Andrade, 123 S.Ct. 1166, 1175 (2003); Holland v. Jackson, 124 S.Ct. 2736 (2004).

The U.S. magistrate also concluded the Court would not consider whether Wilkinson is supportive of appellant's claim, finding that appellant did not argue that Wilkinson provided clearly established federal law, however, petitioner did argue that Wilkinson is supportive that the state court's resolution of the claim was contrary to and an unreasonable application of Wilkinson. See FIRST AMENDED PETITION at 17, 25. The claim creates a liberty interest entitling petitioner to procedural and substantive due process protections. Wilkinson, Id., at 222 (liberty interest in avoiding particular conditions of confinement

may arise from prison policies or regulations). Also see Gotcher v. Wood, 66 F.3d at 1097, 1100-01 (9th Cir. 1995)(liberty interest created when regulation limits circumstances under which credits may be taken away); McQuillion v. Duncan, 306 F.3d 895, 901 (9th Cir. 2002)(quoting Greenholtz, 442 U.S. at 12. Also see Carver v. Lehman, 528 F.3d 659 (2008)(Interpreting RCW 9.94A.728 (former; now RCW 9.94A.729) and finding that Washington State Law Creates a liberty interest in an inmate's early release into the community custody that is protected under the Fourteenth Amendment).

Finally, as previously argued, the good-time credits (for good behavior) here, were awarded by DOC at the outset of appellant's sentence, (WAC 137-30-020; DOC policy 350.100) and taken per DOC policy and regulation's (WAC 137-25-030; DOC 350.100(III)(B)(1), before they were earned in violation of RCW 9.94A.729. This implicates a liberty interest and arbitrary government action. Due process bars arbitrary or wrongful government actions. Fouchcia v. Louisiana, 504 U.S. 71, 72 (1992). The touchtone of due process is protection of the individual against arbitrary action of government. Dent v. West Virginia, 129 U.S. 114, 123 (1989). And this applies

to good time credits. Weaver v. Graham, 450 U.S. 24 (1981). If good time credits are improperly denied, then a prisoner "is . . . disadvantaged by the reduced opportunity to shorten his time in prison simply through good time. Weaver, at 35; Gotcher v. Wood, 66 F.3d 1097, 1100-1101 (9th Cir. 1995)(liberty interest created when regulation limits circumstances under which credits may be taken away). Also see State ex rel. Bailey v. Division of Corrections, 213 W.Va. 563, 584 S.E.2d 197 (2003)(ordering restoration of inmates good time credits which were taken before they were actually earned).

Clearly the above cases cited, especially Bailey, and Gotcher indicate that reasonable jurists could disagree with the district court's and Ninth Circuit's assessment of petitioner's due process claim, both stand for the proposition that good time cannot be forfeited before it is even earned, thus, the Ninth Circuits denial of a COA is in conflict with this Court's precedent as established by Miller-El, and Buck, Id.

B. PETITIONER'S RIGHT TO DOCUMENTARY EVIDENCE CLAIM MEETS THE SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT. 28 U.S.C. §2253(c).

*** Standard for Right to Present Documentary Evidence at Prison Disciplinary Hearing.

The Federal Constitution provides a prisoner the right

to present documentary evidence at a prison disciplinary hearing. Wolff v. McDonnell, U.S. Const. amends. XIV.

The magistrate held that petitioner did not request documentary evidence either before or at the disciplinary hearing, the district court judge differed with the magistrate on this point, and held that petitioner's request for documentary evidence had been denied but held the evidence was irrelevant. The Court should, for the reasons which follow find the district court's, and Ninth Circuits decision's are at least debatable among jurists of reason and grant a COA.

In this case, petitioner was not provided with the minimum due process he was entitled to where he was denied requested documentary evidence at his prison disciplinary hearing. As indicated in the statement of the case section of the First Amended Petition at 3-5, petitioner requested his medical file (documentary evidence) at his disciplinary hearing, which was exculpatory in his defense of the disciplinary infraction. And although the DOC granted a continuance so the files could be

obtained, however, when the hearing was re-convened on September 9, 2013 the files were not obtained or provided for the hearing. See State Court Record Exhibit "D" Appellant's Declaration in Support of PRP.

At the disciplinary hearing conducted on September 9, 2013 petitioner explained his condition of "Shy Bladder" (Paruresis) to hearing officer Stella Jennings, and the need for the documentary evidence, i.e., Diagnosis of "Shy Bladder" (Paruresis) and Heath Status Reports (HSR's), however, Jennings held that the health record (files) were checked for anything that would prevent petitioner from participating in the U/A process and that nothing was found, this in spite of the fact the records were and are in petitioner's medical file. See State Court Record Exhibit "D" Declaration in Support of PRP.

As argued due process in the prison disciplinary context requires that the inmate "be provided an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional goals". Wolf, 418 U.S. at 566.

Here contrary to the district court's findings, petitioner was not provided with the minimal due process rights he was entitled to when the DOC denied his documentary evidence at his disciplinary hearing, thus, the action taken by the DOC prison disciplinary hearing officer was arbitrary and capricious. Wolff, 41 L.Ed.2d at 952.

The district court also found the evidence (documentary health records irrelevant, however, nothing could be more relevant than petitioners' prior diagnosis of "Shy Bladder" (Paruresis), HSR's that had been issued for this condition and his inability to provide a urine sample on the day in question. And although the district court found that appellant was able to provide a sample at a later date, that strained ability to provide that later sample resulted in significant physical injury to appellant, and is not itself relevant to the claim presented here. See State Court Record Declaration in Support of TRO/Preliminary Injunction.

Moreover, the fact, DOC Hearing Officer Jennings claimed nothing was found in petitioner's

medical file to support his claim that he could not provide a U/A because of his "Shy Bladder" (Paruresis), when such documentation was in fact in the medical file proves that the DOC acted arbitrary and capricious. Wolff, 41 L.Ed.2d at 952. Also see Edwards v. Balisok, 117 S.Ct. 1584, at 1586 (1997)("due Process requirements for prison disciplinary hearings are less demanding than a criminal prosecution, but they are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence").

Here, the facts show that petitioner was not allowed to present the only evidence in support of his defense to the disciplinary violation, that defense consisted of petitioners medical condition of "Shy Bladder" (Paruresis), and HSR's for this condition, this was clearly not considered by the disciplinary hearing officer, who instead held there was no such evidence. This demonstrates that reasonable jurists could disagree on the district courts assessment of the claim, that the evidence was irrelevant, thus, a COA should have issued. And the failure to issue a COA by the Ninth Circuit

conflicts with this Court's precedent for when a COA should issue. Miller-El, Buck, Id.

This conflict favors this Honorable Court's exercise of it's Supervisory Powers in Granting Certiorari in this case. Supreme Court Rule 10(a),(b),(c).

II. Conclusion

Based on the foregoing, the Court should grant the Petition for a Writ of Certiorari and order full briefing.

DATED this 26th day of April, 2018.

Respectfully submitted,

Clark L. Stuhr
Petitioner