No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID HILL

Petitioner

v.

BRENT REINKE, RANDY BLADES, AND RICHARD CRAIG

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

This case presents a question affecting the daily operation of prisons and jails across the country that has split the circuits: Can a prison or jail, when transferring an inmate to a mental health facility, avoid the due process protections recognized by this Court in *Vitek v. Jones*, 445 U.S. 480 (1980) by (a) transferring the inmate to a mental health facility that is administratively controlled by the prison or jail, or (b) labeling the transfer, which in Mr. Hill's case lasted 41 days, "temporary"?

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Petition for Writ of Certiorari

David Hill respectfully asks that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the Ninth Circuit Court of Appeals appears at pages 1a-3a of the Appendix to the Petition and is reported at 721 Fed. App'x 707. The opinion of the United States District Court for the District of Idaho is unpublished and is available at pages 4a-40a of the Appendix to the Petition. The Ninth Circuit's order denying en banc review is unpublished and is available at page 41a of the Appendix to the Petition.

Statement of Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on May 1, 2018, and the court denied en banc review on May 31, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

The relevant state statutes and regulations are set forth in pages 42a-74a of the Appendix to the Petition.

Introduction and Statement of the Case

David Hill is an inmate in the custody of the Idaho Department of Correction. Appx. at 2a. During March and April 2011, Mr. Hill was placed in a medical observation cell four times. *Id.* at 16a. During the last placement, Mr. Hill's social worker suggested that Mr. Hill should be transferred to the maximum-security Idaho Security Medical Facility (the "Mental Health Unit"). *Id.* The transfer was approved without any hearing to determine if it was appropriate. *Id.* at 16a-17a. Once transferred, Mr. Hill remained for 41 days, and he still never received a hearing to determine if he belonged. *Id.* at 16a-23a. The Mental Health Unit ultimately transferred him back to his institution when it determined, on its own, that it was not the "appropriate placement" for him. *Id.* at 23a.

Mr. Hill sued several prison officials over the transfer, arguing that he had a due process right to a hearing either before or after being transferred. The district court denied his claim, and the Ninth Circuit affirmed, finding that his 41-day transfer was "temporary" and that the Due Process Clause did not apply because the Mental Health Unit was administratively controlled by the Idaho Department of Correction. *Id.* at 2a, 38a-39a. Mr. Hill respectfully asks this Court to reconsider that decision for the following reasons.

Reasons for Granting the Petition

The Ninth Circuit's decision limits the right of inmates in jails and prisons to a hearing either before or after they are transferred—sometimes incorrectly, as in

Mr. Hill's case—to a mental health facility. This Court should grant certiorari and review the Ninth Circuit's decision for three primary reasons.

First, the Ninth Circuit found that Mr. Hill had no right to a hearing either before or after being transferred because the Mental Health Unit was administratively controlled by the Idaho Department of Correction. That both creates a circuit split and conflicts with *Vitek v. Jones*, 445 U.S. 480, 483, 487-94 (1980) (requiring a due process hearing for a mentally ill inmate under a statute that applied to transfers "to another institution *within or without* the Department of Correctional Services") (emphasis added).

Second, the Ninth Circuit found that Mr. Hill had no right to a hearing because his 41-day transfer to the Mental Health Unit was "temporary." But that, too, is inconsistent with *Vitek* because the outcome in *Vitek* did not hinge—at all—on the length of the inmate's stay in the mental health facility. And it cannot be reconciled with this Court's decision in *Baxstrom v. Herold*, either, because the definition of "temporary" that the Ninth Circuit applied was different than the one that it and the State of Idaho apply to civil commitments, which violates the Equal Protection Clause. 383 U.S. 107, 110 (1966) (recognizing that the Equal Protection Clause prohibits applying different standards to inmates and civil commitments).

Finally, this is a timely and important issue. Approximately 15-20% of inmates in prisons and jails have a severe mental illness, which is roughly triple the number of inmates who suffered from severe mental illness when this Court decided

Vitek.[1] On top of that, the number of hospital beds that are available for mentally ill inmates outside of the prison and jail system has dropped significantly since *Vitek*,[2] meaning that inmates, to the extent they are receiving treatment, are more likely doing so at mental health facilities run by their prisons and jails. Because the Ninth Circuit's decision found that inmates who are being treated in facilities controlled by their prisons and jails have no right to a hearing to determine whether their treatment is appropriate, most inmates—under the Ninth Circuit's reasoning—are now ineligible for the due process protections that this Court recognized in *Vitek*. For these reasons, the Ninth Circuit's decision merits review.

I. Finding that a hearing was unnecessary because the Idaho Department of Correction administratively controls the Mental Health Unit both creates a circuit split and is inconsistent with this Court's decision in *Vitek v. Jones*.

In *Vitek v. Jones*, a Nebraska prison transferred one of its inmates to a mental hospital operated by a state agency after he set fire to his mattress and severely injured himself. 445 U.S. 480, 484 (1980). This Court found that the Due

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[1] NATIONAL SHERIFFS' ASSOCIATION & TREATMENT ADVOCACY CENTER, *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States* 1, 3-6 (May 2010) *available at* http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf. Inmates with severe mental illness are the most likely to be misdiagnosed and incorrectly transferred—as was the case with Mr. Hill. The Mental Health Unit, for instance, is designed to treat Axis I disorders, and Mr. Hill primarily suffers from an Axis II disorder. That matters because an incorrect transfer like Mr. Hill's can exacerbate the underlying disorder, especially if the conditions are highly restrictive at the mental health facility where the inmate is transferred—as was the case with Mr. Hill's transfer to the Mental Health Unit. Appx. at 6a-7a (noting that Mr. Hill could not have any personal property or any contact with other inmates).

[2] NATIONAL SHERIFFS' ASSOCIATION, supra note 1, at 1, 8 (recognizing, for example, that there was 1 psychiatric bed for every 300 people in the United States in 1955, while there was 1 bed for every 3,000 people in 2004).

Process Clause required an adversarial hearing before the transfer to protect two distinct liberty interests. First, the statute authorizing involuntary medical transfers stated that such transfers would occur only if the inmate was mentally ill and could not be adequately treated at his current facility, thus giving the inmate a liberty interest in procedures to ensure that those conditions actually existed. *Id.* at 487-91. Second, independent of the liberty interest created by the statute, the inmate had a liberty interest in avoiding involuntary psychiatric treatment and the stigma associated with being labeled mentally ill. *Id.* at 492-94.

Here, the Ninth Circuit set aside those interests and found that *Vitek* did not apply because the IDOC transferred Mr. Hill to a mental health facility "within an IDOC unit," whereas the transfer in *Vitek* was to a mental health facility run by a separate state agency. Appx. at 2a. That conclusion, though, is inconsistent with the facts of *Vitek* and the nature of the liberty interests that it recognized. It also creates a circuit split with the Fourth Circuit on whether a state can avoid holding a hearing by transferring the inmate to a mental health facility that is controlled by its department of corrections.

1. First, the Nebraska statute in *Vitek* permitted prison officials to transfer a mentally ill inmate "to another institution *within or without* the Department of Correctional Services," and this Court did not differentiate between these two types of facilities when finding that such transfers require a hearing. *Vitek*, 445 U.S. at 483, 487-94 (emphasis added). It simply focused on the liberty interests that were at stake and found that those liberty interests required a hearing. *See id.*

The Fourth Circuit recognized this in *Baugh v. Woodard*, 808 F.2d 333, 334-35 (4th Cir. 1987). There, the court applied *Vitek* in the context of transfers to "a prison facility exclusively for the mentally ill" that was operated by the state's department of corrections. *Id.* In other words, the fact that the department of corrections administratively controlled the prison did not prevent the court from applying the *Vitek* protections. *Id.* The Ninth Circuit's contrary opinion in this case has now created a circuit split on that issue. *See id.*; *see also Bafford v. Simmons*, No. 00-3023-JWL, 2002 WL 1379983, at *2 (D. Kan. Mar. 28, 2002) (rejecting an argument that *Vitek* does not apply to intra-prison transfers and noting that this Court's holding "did not hinge on the fact that the inmate was transferred out of the custody of the Department of Correctional Service," but rather on "the change in the inmate's conditions of confinement").

2. Second, the liberty interests that the Court identified in *Vitek* apply equally to all mental hospitals regardless of their ownership. Inmates like Mr. Hill are entitled to appropriate procedures because of their interest in avoiding a state-imposed classification of mental illness and subsequent involuntary evaluation or treatment. *See Vitek*, 445 U.S. at 494. These interests do not become less important when a state inflicts them through its department of corrections rather than another state agency. Thus, the proper focus of the Ninth Circuit's inquiry should have been on whether the IDOC transferred Mr. Hill under conditions that would classify him as mentally ill and would subject him to involuntary evaluation and behavioral treatment. The fact that the IDOC operates the Mental Health Unit

is irrelevant to this question. *See Vitek*, 445 U.S. at 483; *see also Baugh*, 808 F.2d at 334-35.

Indeed, carving out an exception for transfers to mental health facilities operated by a department of corrections allows states to evade the requirements of the Due Process Clause simply by establishing prison-operated mental hospitals. Through taking that step, the IDOC and similar departments in the Ninth Circuit are now free to transfer and treat inmates without providing any procedural checks against mistakes or incorrect diagnoses, regardless of the damage inflicted to an inmate's dignitary and liberty interests. States should not be able to circumvent the Due Process Clause in this way, and the Ninth Circuit erred in finding that the IDOC's custody over the Mental Health Unit precludes Mr. Hill's right to a hearing.

II. Finding that a hearing was unnecessary because Mr. Hill's 41-day transfer to the Mental Health Unit was "temporary" is inconsistent with *Vitek* and this Court's decision in *Baxstrom v. Herold*.

The Ninth Circuit also found that *Vitek* did not apply to Mr. Hill because his 41-day transfer to the Mental Health Unit was "temporary." Appx. at 2a. There are two problems with that finding.

1. First, the outcome in *Vitek* did not hinge, at all, on the length of the inmate's stay in the mental health facility. *Vitek*, 445 U.S. at 487-94. Rather, the Court found that the inmate was entitled to a hearing *before* being transferred to the mental health facility because of two separate liberty interests: (a) a liberty interest created by Nebraska's relevant statute; and (b) a liberty interest in avoiding behavioral modification treatment and in avoiding the stigma of being labeled mentally ill. *Id.* Put differently, based on either of those liberty interests,

the inmate was entitled to a hearing before the prison even knew how long the transfer to a mental health facility would last. *Id.* So the length of the inmate's stay in the mental health facility did not matter for purposes of determining whether a hearing was required by the Due Process Clause. *Id.*

2. Second, this was no "temporary" transfer based on how the Ninth Circuit and the State of Idaho have previously defined that term in the context of civil commitments, and the Ninth Circuit's contrary decision is therefore incompatible with the Equal Protection Clause. In *Doe v. Gallinot*, for example, the Ninth Circuit examined a civil commitment statute that allowed commitment "for 72 hours on an emergency basis, and up to 14 more days for involuntary treatment, with no requirement that the state initiate a hearing before an independent tribunal to determine whether adequate cause for commitment exists." 657 F.2d 1017, 1019 (9th Cir. 1981). Because of the "massive curtailment of liberty" and "adverse social consequences" that commitment entailed, the court found that failing to hold a hearing after the initial 72-hour detention violated the Due Process Clause. *Id.* at 1023 (quoting *Vitek*, 445 U.S. at 491). In other words, it recognized that there is a limit to how long someone can be held in a mental health facility before process is due and that 14 days was not "temporary" for purposes of the due process analysis. *Id.* at 1023-24.

That conclusion, in fact, is consistent with the relevant Idaho statutes in this case. They specify that the Mental Health Unit where Mr. Hill was transferred can accept civil commitments and that those commitments are entitled to a hearing—to

determine whether their commitment was appropriate—within 5 days. *See* Idaho Code § 1304 (stating that patients in the Mental Health Unit include "mentally ill adult prisoners" and "commitments by the courts pursuant to section 66-329"); Idaho Code § 66-329 (describing the civil commitment process); Idaho Code § 66-326 (requiring a hearing within five days after an emergency civil commitment). In other words, the State itself has decided that someone can be civilly committed on a "temporary" basis for no longer than 5 days before a hearing must be held. *Id.*

While these statutes and the Ninth Circuit's decision in *Gallinot* address civil commitments, the Equal Protection Clause prohibits finding that a different definition of "temporary" applies to an inmate who is committed to the exact same mental health facility. *See Baxstrom v. Herold*, 383 U.S. 107, 109 (1966). In *Baxstrom*, for example, an inmate in a facility for the mentally ill was kept past his sentence based on a procedure where two physicians certified his mental illness to the Department of Mental Hygiene. *Id.* This Court found that this procedure violated the Equal Protection Clause because people who were civilly committed were entitled to a jury trial to determine whether commitment was appropriate. *Id.* at 110 ("We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York."). This means that the definition of "temporary" that applies to civil commitments also applies to Mr. Hill. *Id.* Because the Ninth Circuit's decision that his 41-day transfer was "temporary" is inconsistent

with that definition, it violates the Equal Protection Clause. *Id.; see also United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1081-84 (2d Cir. 1969) ("[P]risoner patients are entitled to substantially the same safeguards afforded non-prisoners before commitment.").

III. Given the growing number of inmates nationwide who suffer from severe mental illness, the question presented in Mr. Hill's case is timely and important.

This Court decided *Vitek* thirty-eight years ago, when state and federal correctional facilities housed approximately 330,000 inmates and only 6% of those inmates suffered from severe mental illness.[3] Since then, the percentage of inmates suffering from severe mental illness has almost tripled and the total inmate population itself has almost quintupled.[4] So prisons and jails are now housing substantially more inmates who are severely mentally ill.

On top of that, the number of public and private psychiatric beds that are available for those inmates has decreased dramatically.[5] This means that not only are prisons and jails having to house substantially more mentally ill inmates, but

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[3] BUREAU OF JUSTICE STATISTICS, *Prisoners in 1980* (May 1981) *available at* https://www.bjs.gov/index.cfm?ty=pbdetail&iid=3365; NATIONAL SHERIFFS' ASSOCIATION, supra note 1, at 1, 3-6.

[4] BUREAU OF JUSTICE STATISTICS, *Census of State and Federal Correctional Facilities, 2005* (October 2008) *available at* https://www.bjs.gov/index.cfm?ty=pbdetail&iid=530; NATIONAL SHERIFFS' ASSOCIATION, supra note 1, at 1, 3-6. More broadly, the percentage of inmates who have been told, at some point in their lives by a mental health professional, that they have a mental health disorder is 37% for those in prison and 44% for those in jail. BUREAU OF JUSTICE STATISTICS, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12* (June 2017) *available at* https://www.bjs.gov/content/pub/pdf/imhprpji1112_sum.pdf.

[5] NATIONAL SHERIFFS' ASSOCIATION, supra note 1, at 1, 8.

they are also—*more often*—having to treat those inmates at their own mental health facilities. If, as the Ninth Circuit found, inmates who are transferred to such facilities have no right to a hearing to determine if the transfer is appropriate, then a substantial, and growing, number of mentally ill inmates no longer enjoy the due process protections that this Court recognized in *Vitek*. Whether that is the correct outcome under *Vitek* is a timely and important question—one that warrants this Court's review. Because Mr. Hill's case offers an appropriate vehicle for reviewing it, he respectfully asks this Court to grant his petition.

Respectfully submitted,

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