ORIGINAL

No. 18-7411

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID H. JACOB — PETITIONER
(Your Name)

vs.

ROSALYN COTTON, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David H. Jacob, pro se #37269
(Your Name)

P.O. Box 2500
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Lincoln, NE 68542-2500
(City, State, Zip Code)

none
(Phone Number)

QUESTION(S) PRESENTED

The Petitioner first filed a state court declaratory judgment action claiming that the state Parole Board had (1) made an ex post facto change to parole suitability standards and (2) that new parole procedures, implemented after the decision in Greenholtz v. Inmates, 442 U.S. 1 (1976), violated Due Process. The state courts summarily dismissed these claims for FAILURE TO STATE A CLAIM for which relief can be granted. The Petitioner then filed an action under 42 U.S.C. §1983 in the U.S. District Court making the same federal constitutional claims.

QUESTION: Can the U.S. District Court, after first finding the Federal Petition does in fact allege federal constitutional claims, summarily dismiss the Federal Petition by giving a collateral estoppel effect to the state court decision of FAILURE TO STATE A CLAIM without violating the holdings in Haines v. Kerner, 404 U.S. 519 (1972) and Allen v. McCurry, 449 U.S. 90 (1980)?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Rosalyn Cotton, Chairperson of the Nebraska Board of Parole;

Rex Richard, Member, Nebraska Board of Parole;

Randall L. Rehmeier, Member, Nebraska Board of Parole;

Teresa L. Bittinger, Member, Nebraska Board of Parole;

Virgil J. Patlan, Member, Nebraska Board of Parole

All these Defendants were sued in their individual capacities.

All of these Defendants are represented by the Nebraska Attorney General.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 724 Fed.Appx. 509 (2018); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. (2017 WL 3206313)

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was May 24th, 2018.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 12th, 2018, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9 of the U.S. Constitution provides:

... No Bill of Attainder or ex post facto Law shall be passed. ...

Amendment XIV of the U.S. Constitution provides:

... Nos 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; ...

Nebraska Revised Statute §83-1,114(1)(b) provides:

(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his or her release unless it is of the opinion that his or her release should be deferred because: ...

(b) His ir her release would depreciate the seriousness of his or her crime or promote disresepct for the law; ...

Prior to the 2003 change, Nebraska Revised Statute §83-1,111(4) (Reissue 1999) (emphasis added) said:

(4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed.

After the 2003 change and currently, Nebraska Revised Statute §83-1,111(4) (Reissue 2008)(emphasis added) says:

(4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole review at least once a year until a release date is fixed.

STATEMENT OF THE CASE

In August of 1986 the Petitioner was sentenced in a Nebraska state court to indeterminate life terms for three counts of Second Degree Murder and not less than 6 years nor more than 20 years on two counts of using a firearm. During 1986, Nebraska statutes provided a minimum sentence of 10 years for the purposes of parole eligibility in Second Degree Murder cases. Under Nebraska's good time law that applies to the Petitioner he became eligible for parole on January 17th, 2015.

Prior to reaching that parole eligibility date, a number of state statutes involving parole procedures and the minimum sentence for Second Degree Murder were amended. A 1995 amendment to Neb.Rev.Stat. §28-105 raised the prior 10 year minimum sentence for Second Degree Murder to 20 years. In 2003, Neb.Rev. Stat. §83-1,111(4) which had provided "hearings" to all offenders eligible for parole was amended to provide only "reviews."

Prior to the Petitioner becoming eligible for parole, in 2014, the Defendant Parole Board members "reviewed" the Petitioner's case and defered him to a "review" to be held a year later in August of 2015. In addition to not providing a "hearing", at issue in this case is the Board members' use of the state statutory reason for their deferal saying:

> The nature/circumstances of your offense(s) indicates that an early release would depreciate from the seriousness of your crime and promote disrespect for the law.

Except for the use of the word "early," this quotes the language found in Neb.Rev.Stat. §83-1,114(1)(b). Having witnessed and experienced the actions of the Parole Board for nearly 30 years, the Petitioner recognized that the Board had created a silent practice of using the new 20 year minimum sentence

as a more severe suitability standard for offenders convicted prior to its statutory implementation.

On January 20th, 2015, three days after reaching parole eligibility, the Petitioner filed suit in State Court seeking a declaration of his rights under the Nebraska parole statutes. The state court Petition alleged that the discovery process would show the Parole Board's decisions in Second Degree Murder cases would reveal this silent practice. Instead of answering the state complaint, the Board members, through counsel, filed a motion to dismiss for failure to state a claim. Without evidence or even a denial of the Petitioner's allegations the state District Court ruled that the Petition failed to state a claim for which relief could be granted and dismissed it.

Petitioner appealed to the Nebraska Court of Appeals. On the Ex Post Facto claim that court found:

> The Parole Board's reasoning for deferring the review makes no reference to the changes in [Neb.Rev.Stat.] §28-105 or the minimum sentence for second degree murder. Section 83-1,114(1) specifically indicates that the Parole Board may defer, on its own opinion, an offender's release on parole. Despite the potential changes that may have occurred in §28-105, there is no indication that the Parole Board considered those changes. Rather, it used its statutorily permitted discretion.

[See, Jacob v. Cotton, A-15-1037, 2017 WL 773661, p.2; cited on p.6 n.3, Appendix B].

Again, without the presentation of evidence or accepting the Petitioner's allegations of a silent practice as true, the Nebraska Court of Appeals made two fundamental errors on the Ex Post Facto claim. First, that Court refused to recognize the question of fact by accepting the Board's recitation of the boilerplate statutory language in §83-1,114(1)(b) over the Petitioner's allega-

tion of the silent practice. In other words, the Court found that because the Board members did not admit to violating the Ex Post Facto clause the Petition's claim failed. Second, the Court found that the statute gives the Board discretion to violate the Ex Post Facto prohibition through this silent practice.

On the Due Process claim the Court recites to Greenholtz v. Inmates, 442 U.S. 1 (1976), but ignores the constitutional significance of the word "hearing" in Nebraska law. In Nebraska a "Board hearing" can be subjected to judicial review in a statutory process called a "Petition in Error" under Neb.Rev.Stat. §25-1901 et seq., whereas a mere "review" cannot. See, Ditter v. Nebr. Bd. of Parole, 11 Neb.App. 473 (Neb.App. 2002). Despite the Petitioner's allegation that "reviews" can hide the arbitrary decisionmaking (such as the "silent practice"), the state Court of Appeals finds the claim fails. [Jacob v. Cotton, supra, 2017 WL 773661, p.3].

The Petitioner sought Further Review of that case in the Nebraska Supreme Court. That request was summarily denied without comment.

While the state court proceedings were taking place the Parole Board had two more opportunities, in 2015 and 2016, to "review" the Petitioner's case. The result of those reviews was the same boilerplate statutory language to defer the Petitioner for another year.

In June of 2017 the Petitioner filed his petition under 42 U.S.C. §1983 in the U.S. District Court requesting relief from the Parole Board members' violation of the ex post facto prohibition of changing parole suitability standards by holding the old 10 year minimum would provide an "early" release that would depreciate the seriousness of the offense and promote disrespect for the law. The Petitioner also complained that the change to "reviews,"

from the "hearings" that the decision in Greenholtz v. Inmates, supra, had found adequate to meet the requirements of Due Process, now violated the Petitioner's federal constitutional right to not be subjected to arbitrary decisionmaking without a remedy.

On its own initial review, the U.S. District Court Richard Kopf found the Complaint does in fact allege federal constitutional claims." [p.5, Appendix B]. But then the Court finds the Petitioner cannot "relitigate in federal court the issues decided against him in the state courts." [Id.] The U.S. District Court then dismissed the Complaint with prejudice by applying the doctrine of collateral estoppel. [p.5-6, Appendix B].

The Petitioner filed a Rule 59(e) motion to alter or amend that judgment. The Complaint filed in the Federal Court specifically alleged that the process of the state court proceedings [p.2-3, Complaint, Appendix D] and that they had been inadequate and a subterfuge to evade the federal constitutional issues. The U.S. District Court had not given these factual allegations the presumption of correctness required by Haines v. Kerner, 404 U.S. 519 (1972). The Motion argues that the Petitioner had not been given a "full and fair hearing" in those state court proceedings that would be necessary to apply a collateral estoppel effect to them; Allen v. McCurry, 449 U.S. 90 (1980). The State Courts had failed to accept the Petitioner's allegations of the Board's use of the new 20 year minimum as an after the fact suitability change and had failed to allow the Petitioner to present evidence to prove that allegation. The Motion described how the change to "reviews" from "hearings" was to evade the Federal Due Process guarantee against arbitrary decisionmaking. The Motion also gave specific examples of how the use of the boilerplate statutory language in Neb.Rev.Stat. §83-1,114(1)(b) could be used to hide both the arbitrary and invidious decisionmaking prohibited by the Due Process Clause.

District Court Judge Richard Kopf responded by obtaining certain documents from the record of the state court proceedings and place them into the record of this case to support his ruling. But those documents show the Petitioner's state court allegations were not given the presumption of correctness. In fact, they show the "full and fair hearing" required to apply collateral estoppel was never provided. Regardless, the Court denied the Rule 59(e) motion and the Petitioner appealed.

The Petitioner filed briefing in the Eighth Circuit Court of Appeals and the Court made a summary denial of the appeal citing to a Nebraska Supreme Court decision, Hara v. Reichert, 843 N.W.2d 812, 816-17 (Neb. 2014). The Eighth Circuit Court said nothing about the U.S. Supreme Court decisions cited by the Petitioner. [Appendix A]. The Petitioner's request for rehearing by the panel and en banc was denied without comment. [Appendix C].

The Petitioner now seeks a Writ of Certiorari to examine the Federal Court decisions below.

REASONS FOR GRANTING THE PETITION

The Court should grant the writ in this case for two reasons; (1) The Eighth Circuit Court of Appeals has affirmed an important federal question in a way that conflicts with the relevant decisions of the U.S. Supreme Court; and (2) The Eighth Circuit Court of Appeals has sanctioned the U.S. District Court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The Ex Post Facto Violation

The Court of Appeals should not have allowed the District Court's ruling to stand. In Haines v. Kerner, supra, this Court decided that the factual allegations of a pro se litigant were to be liberally construed in their favor and presumed to be true. Not only did the U.S. District Court not accept the Petitioner's allegations about the inadequacy of the state court proceedings, they also ignored the fact that the state courts had committed that same error. The state courts had refused to accept the Petitioner's factual allegation that the Parole Board was using the new 20 year minimum sentence as a change to the parole suitability standard for those Second Degree Murder offenders who had only received the prior 10 year minimum sentence. Upon reading that the Nebraska Court of Appeals had concluded that the Parole Board didn't say they were applying the change to §28-105 to deny parole, the U.S. District Court should have asked, "How does the Nebraska Court of Appeals come to that conclusion while assuming the Petitioner's factual allegation to be true?" Instead of dismissing the Federal Complaint, the U.S. District Court should have found the Nebraska Court of Appeals presumed facts not in evidence and contrary to the Petitioner's state complaints' factual allegations. That would be the usual course of proceedings that the Haines decision requires. But

the U.S. District did NOT follow Haines and, instead, gave a collateral estoppel effect to the Nebraska Court of Appeals (erroneous) ruling.

The U.S. District Court's application of collateral estoppel to the Petitioner's Federal Complaint was contrary to the U.S. Supreme Court's decision in Allen v. McCurry, supra, and should not have been affirmed by the Court of Appeals. The U.S. District Court was required to apply state law standards for the application of collateral estoppel; 28 U.S.C. 1738 and W.F.M. Inc. v. Cherry Cty, 279 F.3d 640, 643 (8th Cir. 2002). In Nebraska state law there are four required elements to apply collateral estoppel, one of which is a judgment "on the merits"; Cunningham v. Prime Mover, Inc., 252 Neb 899, 901 (1997). But the dismissal for failure to state a claim under Nebraska law does not test the claim's substantive merits; Doe v. Omaha Public School Dist., 273 Neb 79, 82 (2007). The Petitioner's state court action was dismissed for failure to state a claim [Jacob v. Cotton, 2017 WL 773661, p.2]. Therefore, that decision was not "on the merits" and state law would not apply a collateral estoppel effect to that decision. The records shows the Nebraska Courts did NOT provide the requirements of a "full and fair hearing". This Court's holding in Allen v. McCurry, supra, requires a full and fair hearing before collateral estoppel can be applied.

No court has yet addressed the evidence supporting the factual alleagation that the Nebraska Board of Parole members are using a later change to the statutory penalty as a change to parole suitability standards in violation of the Ex Post Facto prohibition. Both the state and federal complaints alleged that this was happening, has happened to the Petitioner, and continues to happen, (Since the time of filing the Federal Complaint the Petitioner has been "reviewed" twice by the Board, in 2017 and 2018, with the same results.)

Both the state and federal Complaints alleged that the records of the Parole Board decisions using the statutory language from §83-1,114(1)(b) would show that this is being used against Second Degree Murder offenders sentenced prior to the 1996 change to the minimum sentence [p.8-11, ¶¶43-58, Appendix D]. The Fiscal Year 2017 Annual Report of the Nebraska Board of Parole is available online. That report shows the Board denied or deferred parole in 3552 cases that year, but only 147 denials were done using the reason, "Release would depreciate Seriousness of Offense". It should be easy to check how many of those 147 were Second Degree Murder offenders in the same position as the Petitioner. That evidence has never been provided to nor examined by ANY court.

The U.S. Supreme Court has ruled that after the fact changes to an inmate's suitability for parole that create a significant risk of increasing the severity or duration of the punishment violate the ex post facto prohibition; Garner v. Jones, 529 U.S. 244 (2000) and California v. Morales, 514 U.S. 499 (1995). Other Federal Circuits recognize this; see, Daniel v. Fulwood, 766 F.3d 57 (D.C. 2014). The Court should not allow the Eighth Circuit to evade this federal question by failing to live up to this Court's rulings in Haines v. Kerner, supra, or Allen v. McCurry, supra.

The Due Process Claim

On the Due Process Claim, both the Nebraska Courts and the U.S. District Court are trying to rewrite this Court's decision in Greenholtz v. Inmates, 442 U.S. 1 (1976). Greenholtz found that Nebraska's parole statutes create a liberty interest entitled to some protection under the Due Process Clause. Id., supra, 442 U.S. at 12, and Board of Pardons v. Allen, 482 U.S. 369, 373-374 (1987). But Nebraska officials thought they would be clever and change the parole procedures to have no judicial oversight and still claim the

Greenholtz decision says their procedures are constitutionally adequate. However, the Greenholtz relied upon the procedure of providing every eligible offender with a "hearing" was sufficient for Due Process considerations and that is NOT the current procedure provided to the Petitioner.

The Greenholtz Court found, "Two types of hearings are conducted: initial parole review hearings and final parole review hearings." Id., supra, 442 U.S. at 4 (emphasis added). The Court also said, "However, since the Nebraska Parole Board provides at least one and often two hearings every year to each eligible inmate, we need only consider whether the additional procedures mandated by the Court of Appeals are required under the standards set out in Mathews v. Eldridge, [424 U.S. 319] at 335...." Greenholtz, supra, 442 U.S. at 14 (emphasis added). It was these "hearings" that provide the process for correcting arbitrary decisionmaking in the state Petition in Error procedures. (The touchstone of Due Process is protection of the individual against arbitrary action of the government. Wolff v. McDonnell, 418 U.S. 539, 558 (1974) citing Dent v. West Virginia, 129 U.S. 114, 123 (1889).)

The word manipulation the State has used here is simple. At the time of Greenholtz, "hearing" was the noun, "review" was just an adjective which did not affect the judicial oversight procedure. But the 2003 statutory change to Neb.Rev.Stat. §83-1,111(4) eliminated annual "hearings" and replaced them with (now a noun) "reviews" with no judicial oversight available. See, Ditter v. Board of Parole, supra. Such a change cannot be justified constitutionally simply by saying, "the Greenholtz decision says our parole procedures are adequate."

The Petitioner's case is a perfect example of the constitutional difference created by this statutory change. If the Petitioner had been provided with a "hearing" when he became eligible for parole, he could have challenged the

Board's ex post facto violation in a state Petition in Error procedure; satisfying the minimum requirements of Due Process. Today, the Petition in Error procedure is no longer available. The Greenholtz decision and reasoning does NOT support this. Unless this Court grants the writ, vacates the decision below, and remands the case to consider this Due Process claim, the state courts, the U.S. District Court, and the Eighth Circuit Court of Appeals will have rewritten the Greenholtz decision and undermined the minimal requirements of the Due Process protection.

One reason the Petitioner has filed his Complaint is that Nebraska's prison system is now one of the most overcrowded in the nation. The ACLU has filed a lawsuit in the U.S. District Court that argues the consequences of this overcrowding violate the constitution. Sabata, et al. v. NDCS, No.4:17cv3107. But the ACLU suit says nothing about what caused the overcrowding. It is the Petitioner's (and much of the other inmate population) that the change in the parole procedures is at least one of the causes. A proper hearing of this issue would go a long way toward telling state officials that when they fool around with constitutional requirements there will be unexpected consequences. This issue can show the cause and effect between the parole procedure changes and the resulting prison overcrowding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David H. Jacob
Date: 10/05/18