ORIGINAL

No. 18-7827

In the Supreme Court of the United States

ROGER LEE KAUFMAN,

Petitioner,

v.

WARDEN PAUL S. KEMPER, ET AL.,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER L. KAUFMAN #205453
Racine Correctional Institution
P.O. Box 900 Unit: Washington East
Sturtevant, WI 53177

Petitioner pro se

Date: January 6th, 2019

QUESTION PRESENTED

Whether a state prisoner is entitled under the Due Process Clause, and the Separation of Powers Doctrine of the United States and Wisconsin Constitution[s] to a parole hearing when a court deposes of every federal guideline dealing with parole eligibility that includes 18 U.S.C. §4205(a) and 18 U.S.C. §4208(a) and all state[s] parole guidelines and all Wisconsin sentencing parole statutes and parole guidelines in violation of the Ex Post Facto Clause?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14, 1(b), the following identifies all of the parties appearing here and before the United States Court of Appeals for the Seventh Circuit:

The Petitioner is Roger Lee Kaufman #205453, a pro se litigant, appellant, inmate housed at the Racine Correctional Institution, at P.O. Box 900, Unit: Washington East, Sturtevant, Wisconsin 53177.

The Respondents' are Paul S. Kemper: Warden-RCI, Robert G. Probst: Asst. Atty. General, Wisconsin Department of Justice, 17 W. Main Street, P.O. Box 7857, Madison, WI 53707-7857, appellees and the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

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DECISIONS AND ORDERS BELOW

The Order[s] of the United States Court of Appeals for the Seventh Circuit is not reported and is unpublished, it is cited as Case No. 18-1482 and is reproduced at Appendix B-1 and C-1.

The Decision and Order of the U.S. District Court for the Eastern District of Wisconsin is not reported and is unpublished, it is cited as Case No. 16-C-1587, it is reproduced at Appendix A 1-17.

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit was entered on September 20, 2018. Petitioner-Appellant filed petition for Rehearing En Banc on October 3, 2018, and the Court issued an Order denying same on October 18, 2018. A reproduced copy of that order is found at Appendix C-1. Jurisdiction of this matter is conferred on the U.S. Supreme Court by 28 U.S.C. §1251(a)(b)(2); 28 U.S.C. §1254(1); 28 U.S.C. §1291; and 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. Amendment V and Amendment XIV to the United States Constitution, which provides:

Amendment V, in part reads; "No person shall be"...."deprived of life, liberty, or property without due process of law", and;

Amendment XIV, in part reads; "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"., and;

2. The United States Declaration of Independence, attributing unalienable Right[s], to Life, Liberty and the pursuit of Happieness, as established in Amendment V and Amendment XIV.

3. The Separation of Powers Doctrine, as enumerated under;

Art. I Section 1, that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." and;

Art. II Section 1[1], that, "The executive Power shall be vested in a President of the United States of America.", and;

Art. III Section 1[1], that "The judicial Power of the

United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.", and;

Art. III Section 2[1], that, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States...and between a State, or the Citizens therof....", and;

Art. III Section 2[2], that, "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact....", and;

4. Ex Post Facto Law Doctrine as enumerated under;

Art. I Section 9[3], that, "No Bill of Attainer or ex post facto Law shall be passed." and;

Art. I Section 10[1], that in part, "No State shall...pass any....ex post facto Law.", and;

5. Federal Codes under;

18 U.S.C. §42059(a)(1977), that in part, "(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms...", and;

18 U.S.C. §4208(a)(1977), that in part, "(a) Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole.", and;

6. Wisconsin Statutory and Administrative Codes, which provides:

Wisconsin State Statute §973.014 (1987-88), reads:

§973.014 Sentence of life imprisonment: parole eligibility determination. When a Court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, the Court shall make a parole eligibility determination regarding the person and choose one of the following options:

(1) The person is eligible for parole under s. 57.06(1),
(2) The person is eligible for parole on a date set by the Court. Under this subsection, the Court mat set any later date than that provided in s. 57.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 57.06(1).

Wisconsin State Statutes §304.01(1) and (2), reads:

(1) The chairperson of the parole commission shall administer and supervise the commission and its activities and shall be the final parole granting authority.
(2) The parole commission shall conduct regularly scheduled interviews to consider the parole of eligible inmates of the adult correctional institutions under the control of the department of corrections.

Wisconsin Administrative Code PAC 1.06(1), reads:

(1) Except as provided in s. PAC 1.05(1), for persons sentenced for offenses that occurred before December 31, 1999, the initial release consideration shall be scheduled during the month prior to the date of first statutory eligibility for parole, unless waived in writing by the inmate, the inmate is not available, in which case the commissioner will set a new interview date, or the inmate has been transferred after which an interview will be scheduled as soon as practicable.

Wisconsin Administrative Code PAC 1.05(1), reads:

(1) INITIAL ELIGIBILITY. The commission shall not consider for parole or release to extended supervision any person who is sentenced to the department's custody until the person has been confined at least 60 days following sentencing.

Wisconsin Administrative Code PAC 1.05(2)(b), reads:

(b) Initial parole eligibility. For persons sentenced for offenses committed before December 31, 1999, the inmate's eligibility for discretionary parole will be determined under s. 304.06, Stats.

STATEMENT OF THE CASE

A. Facts

The Petitioner, Roger Lee Kaufman, after having exhausted his state court remedies filed a federal writ of habeas corpus under 28 U.S.C. §2254 with the U.S. District Court for the Eastern District of Wisconsin on November 29, 2016.

Kaufman's petition had shown;

1. Kaufman was entitled under Wis. Stats. §973.014(2) to a timely parole eligibility date as set by the sentencing court, and mandated by the above statute, at 25-years, a date that has come and gone on April 21, 2014.

2. Kaufman was entitled under Wis. Admin. Code PAC 1.06(1) to a timely parole eligibility hearing/interview to be scheduled on March 23, 2014, 30 days prior to his initial parole eligibility date of April 21, 2014.

3. Kaufman was entitled under Wis. Stat. §304.01(2) to timely subsequent regularly scheduled parole eligibility hearings/interviews.

4. Kaufman had shown that Wis. Stats. §973.014(2) is a working ex post facto law and is unconstitutional.

5. Kaufman had shown that Wis. Stats. §57.06(1) minimum parole eligibility was formulated at 13-years and 4-months under Wis. law.

The District Court having reviewed the petition, ruled in favor of Kaufman on all affirmative defenses of the respondent. However, in denying relief, the District Court ruled Kaufman was not entitled to a parole hearing under the due process clause. As such, the District Court deposes of all federal guidelines dealing with parole eligibility that includes 18 U.S.C. §4205(a) and 18 U.S.C. §4208(a) and of all state[s] parole guidelines and all of Wisconsin's sentencing parole statutes and parole guidelines, (including §973.014(1) & (2), §304.01(1) & (2), §57.06(1), and Wis. Admin. Code PAC 1.05 and 1.06), in violating the separation of powers doctrine & in violation of the ex post facto clause of the U.S. Constitution.

Kaufman then appealed to the U.S. 7th Circuit Court of Appeals on March 1, 2018 under 28 U.S.C. §2254, and filing an application for a certificate of appealability and a motion to expedite the appeal. The two judge panel DENIED Kaufman's filings under 28 U.S.C. §2253(c)(2) on September 20, 2018.

Kaufman then filed a petition for rehearing en banc on October 3, 2018, under FRAP Rule 35(a)(1) and (2); and FRAP Rule 35(b)(1)(A) and (B); and FRAP Rule 35(f), and in accordance with 28 U.S.C. 2241(a).

Kaufman's petition for rehearing en banc had shown:

6. That the two judge panel was a violation of 28 U.S.C. 46(c).

7. That the Circuit Court Order conflicts with past decisions and precedents established by this U.S. Supreme Court and other U.S. Courts of Appeals that have addressed the issue of parole eligibility dates and parole eligibility hearings/interviews.

8. That the District Court's Decision and Order, presented the separation of powers doctrine violation as a new issue where the District Court deposed of all federal and state[s] parole sentencing statutes, parole eligibility statutes, parole eligibility hearings/interviews-rules-regulations-guidelines-codes that are of all federal and state[s].

9. That Kaufman was entitled under the due process clause to a timely parole eligibility date and timely parole eligibility hearings/interviews and that he was entitled to relief consistent with settled case law.

The petition for rehearing en banc was DENIED on October 18, 2018.

B. Basis For Supreme Court Jurisdiction

This case raises questions involving the Due Process Clause under the V and XIV Amendments of the U.S. Constitution and U.S. Declaration of Independence where a person is entitled to a parole hearing by law and where a court deposes of every federal guideline dealing with parole eligibility that includes 18 U.S.C. §4205(a) & 18 U.S.C. §4208(a) and of all state[s] parole guidelines and of all Wisconsin

sentencing parole statutes and parole guidelines under the ***Separation of Powers Doctrine*** of the United States Constitution Art. I Section 1, Art. II Section 1[1], Art. III Section 1[1] and Art. III Section 2[1] and Section 2[2] violating the ***Ex Post Facto Clause*** under Art. 1 Section 9[3] and Art. 1 Section 10[1] of the United States Constitution.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

I. The Separation of Powers Doctrine strictly prohibits one branch of government from encroaching upon and exercising the powers granted to other branches.

The Separation of Powers Doctrine is not expressly set forth in the U.S. or Wisconsin Constitution[s], but is rather embodied in the provisions that vest legislative, executive and judicial powers in the three separate branches of government: the legislative, which is empowered to make laws; the executive, which is required to carry out the laws; and the judicial, which is charged with interpreting the laws and adjudicating disputes and laws. Under this constitution doctrine of "separation of powers", one branch is not permitted to encroach on the domain or exercise the powers of another branch. *See* U.S. Const., Art. I-III.

Not all governmental powers, however, are exclusively committed to one branch of government by the U.S. or Wisconsin Constitution[s]. Those powers which are not exclusively committed may be exercised by other branches. In areas of shared power, however, one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's essential role and powers. *State v. Holmes*, 106 Wis. 2d 31, 44, 315 N.W. 2d 703(1982). The doctrine serves to maintain the balance between the three branches, preserve their independence and integrity, and to prevent the concentration of unchecked power in the hand of one branch.

In this case, the District Court ruled Kaufman was not entitled to a parole hearing under the due process clause, as such, the District Court deposed of all state[s] and of all federal parole eligibility sentencing statutes, parole eligibility statutes, parole hearing/interviews-rules-regulations-guidelines-codes that are of all state[s] and of all federal. That includes but not limited to: 18 U.S.C. §4205(a)(1977) and 18 U.S.C. §4208(a)(1977) that is similar to Wis. Admin. Code PAC 1.06, where both provide that the initial release consideration shall be 30 days prior to initial statutory eligibility for parole.

The District Court in deposing of all state[s] and of all federal parole systems had unduly burdened and substantially interfered with the legislative Powers invested in Congress and the state[s] via the U.S. Const. Art. I Section 1, and the Wis.

Const. Art. IV, Section 1. This U.S. Supreme Court correctly, ***In Greenholtz***, 442 U.S. 1, 7 (1979), ruled that the state[s] have legislative authority to create and maintain their own parole systems. The District Court's ruling, running afoul, violates this *"separation of powers doctrine".*

Kaufman had substantially shown he had a Constitutional protected due process right under state law[s]: Wls. Stats. §973.014(1) & (2); Wis. Stats. §304.01(1) & (2); and Wis. Admin. Code PAC 1.05 & 1.06, and under the V and XIV Amendments of the U.S. Const. to a timely minimum parole eligibility date(set by the court at 25-years/April 21, 2014), to a timely parole eligibility hearing/interview(set one month prior to initial parole eligibility a March 23, 2014 date), and to all subsequent regularly scheduled parole eligibility hearings/interviews, and that un-entitlement to them by the District Court is an *"ex post facto violation"* and effectively interfered with all legislative Powers of Federal & State, to create and maintain parole eligibility sentencing statutes, parole eligibility statutes, parole hearing/interviews-rules-regulations-guidelines-codes, as such ending all parole system[s] in the United States.

If a person is not entitled under the due process clause to a parole hearing/interview that is mandated by federal and state law[s], than no eligibility date need ever be provided as no one is entitled to a parole eligibility hearing/interview-thus

deposing thereof of all United States parole law[s].

II. The Due Process Clause of the United States Constitution under the V and XIV Amendments, and the United States Declaration of Independence, strictly protect the unalienable Right of a person[s] Liberty.

The District Court in violating the separation of powers doctrine stated Kaufman has no liberty interest in a parole hearing in quoting *Grennier v. Frank*, 453 F. 3d 442, 444(7th Cir. 2006). Unlike *Grennier*, here Kaufman claims his protected Liberty interest[s] under the U.S. Const. V and XIV Amendments in that:

> **Quoting V Amendment U.S.C.:**
>
> "No person shall be"....."deprived of life, liberty, or property without due process of law" **unquote**
>
> **Quoting XIV Amendment U.S.C.:**
>
> "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." **unquote,**

here, Kaufman furthermore declares his God given unalienable Right[s] to Life, Liberty and the pursuit of Happieness as reiterated in the Declaration of Independence of the United States, and in just accordance with all of the United States and Wisconsin, statutes-codes-regulations that mandate and require by settled federal and state law; his timely initial parole eligibility date that was set at 25-years for April 21, 2014, his

timely initial parole eligibility hearing/interview that was to be set one month prior to his initial parole eligibility, a date of March 23, 2014, and his subsequent regularly schedule parole/hearings (as many as 4 subsequent hearings/interviews should have taken place). Kaufman declares his Right to Liberty that is unalienable.

Furthermore, Kaufman asserts his protected liberty interest in parole release after 25-years, where the sentencing court points out that the parole eligibility, "while it is discretionary", it does not provide for an automatic release after 25-years, but that Kaufman "will have" eligibility for that purpose. *Id.* at pg. 30 no. 20-25, pg. 31 no. 1-3 sentencing transcript.

Whether or not Kaufman would in fact been paroled after the 25-year mark will depend on other factors exisiting at that time, here however-but because the DOC and Wis. Parole Commission had changed Kaufman's parole eligibility and had never provided a parole eligibility hearing at the 25-year mark and continue to deny Kaufman parole eligibility, Kaufman did not have eligibility for that purpose which was "automatic release".

In Peugh v. United States, 133 S. Ct. 2072(2013), this U.S. Supreme Court specifically indicated that the mere fact that the prisoner was not guaranteed parole but rather received it at the will of the parole board was not fatal to his claim, here Kaufman was entitled to a timely minimum parole eligibility date on April 21, 2014, and a timely

minimum parole eligibility hearing/interview on March 23, 2014, by statute which had substantially set these dates at set times which had come and gone by years now. The court[s] seemingly imply that Kaufman has no due process right to those set dates by law and statute thereby changing Kaufman's sentence to life imprisonment without the possibility of parole which violates the ex post facto clause-as Wisconsin had no law giving the court[s] nor any administrative agency authority to impose such a sentence in 1989. The DOC and Wis. Parole Commission, and the District Court, acted under color of law, thus those acts are acts of law, illegally changing Kaufman's sentence to life without the possibility of parole-acting/working ex post facto violation.

III. Review of Entire Case if Necessary

This is a case that involves simple math, where the math cannot lie! Kaufman was sentenced to a life term on December 15, 1989 that included sentence credit for time served in county jail from April 21, 1989 to December 15, 1989 applied to Kaufman's 25-year minimum parole eligibility date set by the court, which clearly provided for the possibility of parole after 25-years and "automatic release" at that time.

The 25-year mark has come and gone as of April 21, 2014. The DOC and the Wis. Parole Commission changed Kaufman's initial minimum parole eligibility date and

Wis. Stats. 973.014(2)), and refuses to provide a parole hearing/interview (as required by the Wis. Admin. Code PAC 1.05 and 1.06, and Wis. Stats. §304.01(2)), thereby effectively changing Kaufman's sentence to Life without the possibility of parole in violation of the ex post facto clause, acting under color of law.

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CONCLUSION

This United State Supreme Court should GRANT the Writ of Certiorari, reversing and remanding to the District Court with specific instructions to resentence Kaufman in accordance with ***United States v. Wigoda***, 521 F. 2d 1221(7th Cir. 1975), to the minimum parole eligibility of 25-years, Grant time served, and Order his immediate release.

Respectfully Submitted on this 16th day of January, 2019.

Submitted By: Roger L. Kaufman

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