No. 18-8866

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

WINSTON GREY BRAKEALL–PETITIONER

VS.

ROBERT DOOLEY–RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(No phone number)

QUESTIONS PRESENTED

1. This Court has never upheld the findings in *United States v. Von Behren,* 822 F.3d 1139 (10th Cir. 2016), in which the Court of Appeals held that compelled self-incrimination through the use of polygraph examinations as a requirement of parole, even in a therapeutic setting, was violative of parolees' Fifth and Fourteenth Amendment rights. South Dakota, along with virtually all other jurisdictions, mandates the frequent use of polygraph examinations for all sex offenders under threat of incarceration and revocation of parole. Will this Court allow this systemic violation of parolees' rights to stand?

2. Did the District Court err in refusing to address the merits of a "colorable claim of a constitutional violation" based on procedural error when petitioner did not have meaningful access to legal materials and the entity maintaining his custody is responsible for both the constitutional violation and the lack of access to legal remedies?

LIST OF PARTIES

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

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

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A and is reported at *Brakeall v. Dooley,* 2018 U.S. App. LEXIS 36923

The opinion of the United States District Court for the District of South Dakota appears at Appendix B and is reported at *Brakeall v. Dooley,* 2018 U.S. Dist. LEXIS 119856.

The opinion of the Second Judicial Circuit of South Dakota appears at Appendix C and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 4, 2018. (Appendix A, p 1)

A timely petition for rehearing was denied by the United States Court of Appeals on January 11, 2019. (Appendix A, p 2)

The United States Court of Appeals issued its mandate in this matter on January 18, 2019. (Appendix A, p 3)

The date on which the District Court for South Dakota, Southern Division, issued its decision in this case was July 18, 2018. In this order, the court denied reconsideration and ruled that a Certificate of Appealability would not issue. The Judgment in this case issued the same day. Copies of the Order and Judgment appear at Appendix B.

The date on which the Second Judicial Circuit of South Dakota decided my case was June 28, 2017. (Appendix C, p 1)

The Findings of Fact and Conclusions of law in the revocation of petitioner's parole issued by the South Dakota Board of Pardons and Paroles was originally entered on July 11, 2016 and an amended order issued in August 2016. (Appendix A, p 2)

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

Full texts are set forth at Appendix D

FEDERAL STATUTES

SOUTH DAKOTA CODIFIED LAW

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated.

I. The course of proceedings in the § 2254 case now before this Court:

In June 2016, petitioner's parole in South Dakota was revoked due to being terminated from treatment based solely and exclusively on the results of a polygraph examination. A final decision issued in August 2016. (Appendix C)

Petitioner filed a petition for writ of habeas corpus in the Second Judicial Circuit Court of South Dakota. This petition was dismissed June 28, 2017. Appendix C)

Petitioner appealed this dismissal to the District Court of South Dakota. This was dismissed and the court ruled that a Certificate of Appealability would not issue on July 18, 2018. (Appendix B)

This dismissal was appealed to the United States Court of Appeals for the Eighth Circuit. The date on which the United States Court of Appeals decided this case was December 4, 2018. A timely petition for rehearing was denied on January 11, 2019 and the court's mandate issued January 18, 2019. (Appendix A).

II. Relevant facts concerning the underlying revocation of parole are set forth

below:

Petitioner, Winston Grey Brakeall, was placed on parole in December 2014 and housed in the South Dakota Department of Corrections' Community Transition Program (CTP)[1] facility in Sioux Falls.

As a condition of parole, petitioner was assigned to sex offender treatment with Josh Kaufman at Dakota Psychological Services (DPS) by the Sex Offender Management Program (SOMP), an agency of the Department of Corrections. Petitioner was required to sign a non-negotiable contract with DPS which stated that there would be no doctor-patient confidentiality and any disclosures made in treatment would be reported to Parole and Sioux Falls Police.

The contract also required petitioner to submit to polygraph examinations as ordered by DPS and/or SOMP. These exams would be conducted no less than twice a year and a often as monthly. Failure to "fully participate" in any of these exams would result in immediate incarceration and possible revocation of parole.

Prior to each polygraph, every sex offender on parole in South Dakota, including petitioner, is required to fill out a pre-test questionnaire booklet which demands answers regarding more than thirty felonies and misdemeanors, including the omnibus "describe each time you've broken the law."

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1 CTP is a halfway house parole program operated by the Department of Corrections in several trustee facilities.

During the exam itself, petitioner was not offered immunity or any other legal protection for any statements made before, during, or after the examination. The results would not be provided to the petitioner, but only to treatment providers and parole agents. Petitioner and every sex offender on parole or supervision in South Dakota was required to answer questions involving sexual assault on a minor (SDCL 22-22-7), the viewing of child pornography (SDCL 22-24A-3), and solicitation of a minor for sexual purposes (SDCL 22-24A-5).

During each of these exams, petitioner informed the polygraph examiner that he was not taking the polygraph voluntarily, but only as a condition of parole to avoid incarceration.

The SOMP approved polygraph examiners claim that petitioner "reacted" (failed) six of eight polygraphs in 2015. After polygraph three, petitioner was placed in the Jameson Prison Annex in maximum security general population as a sanction and held for a month. Following polygraph seven, petitioner was placed in the South Dakota State Penitentiary for ninety day as a sanction.

The final polygraph of 2015 was administered in the prison. When petitioner failed this exam, he was pressured to make disclosures of deviant thoughts or actions to explain the failed exam, threatening revocation of parole if petitioner couldn't "justify" the failed exam.

Based solely and exclusively on the disclosures of non-criminal acts made following this polygraph, petitioner's parole was revoked in June 2016 with a final decision issuing in August 2016.

One important point needs noting here. The District Court found that petitioner had presented "a colorable claim of a constitutional violation." However, the policies of the South Dakota Department of Corrections prevented the petitioner from accessing the case law which would have allowed him to present this matter as an administrative appeal under South Dakota Codified Law Ch. 1-26 and petitioner is procedurally barred from attacking this decision in any other fashion.

III. Existence of Jurisdiction below:

Petitioner's parole was revoked by the South Dakota Board of Pardons and Paroles for termination from treatment based solely and exclusively on coerced disclosures of non-criminal acts following a polygraph. A petition for writ of habeas corpus was made in the Second Judicial Circuit of South Dakota. A § 2254 motion was appropriately made in the District Court of South Dakota and duly appealed to the United States Court of Appeals for the Eighth Circuit.

IV. The Court of Appeals for the Eighth Circuit has decided a Federal question in a way in conflict with the applicable decision of the Ten Circuit.

The District Court found that petitioner has presented "a colorable claim of a constitutional violation," recognizing that *United States v. Von Behren,* 822 F.3d 1139 (10th Cir 2016) was persuasive, but not binding on the Eighth Circuit and limiting the protections of the Fifth and Fourteenth Amendments for the inhabitants of the Eighth Circuit.

V. The questions raised in this petition are important and unresolved.

This is a coerced confession case which does not involve the confession of any crime. Petitioner was required to submit to numerous polygraph examinations as a condition of parole under threat of immediate incarceration and revocation of parole. This is the situation sex offenders on parole or supervision face in virtually all jurisdictions.

Petitioner was never accused of any additional crime; there was never any allegation or investigation, merely the termination from treatment and resulting revocation of parole based on the pseudoscience of polygraphy.

The Tenth Circuit held in *United States v. Von Behren,* 822 F.3d 1139 (10th Cir 2016) that being required to answer questions which could be a link in the

chain of evidence toward the investigation of an uncharged crime was an impermissible infringement on Von Behren's right against self-incrimination.

How much greater is the infringement of rights when the petitioner is deprived of his freedom without any evidence, allegation, or whisper of criminal activity beyond the tracing of a pen? Nothing in the polygraph results indicated anything but fear and the State used this fear to coerce disclosures of non-criminal acts which did not violate parole rule to justify the revocation of parole.

South Dakota requires challenges to parole revocations to follow an administrative appeals process, while denying the newly revoked ex-parolee access to virtually all legal materials. Petitioner was unable to research his revocation until after the thirty day deadline had passed and the District Court perpetuated this violation in holding him to be procedurally barred from addressing the merits of this case.

The Eighth Circuit has decided important questions of law that are in conflict with the holdings of the Tenth. This disharmony between the circuits is a firm basis for granting certiorari in this case.

1. The District Court made a questionable ruling, holding that petitioner had presented "a colorable claim of a constitutional violation" but refusing to address the question due to the State's self-imposed impediment of a

procedural bar.

2. This petition presents a more fundamental question for review: Can the State profit from its denial of access to legal materials which prevent illegal or unconstitutional practices to continue?

I respectfully urge that all aspects of this decision are erroneous and at variance with this Court's decisions as explained in the argument below.

ARGUMENT

1. This Court has never upheld the findings in *United States v. Von Behren,* 822 F.3d 1139 (10th Cir. 2016), in which the Court of Appeals held that compelled self-incrimination through the use of polygraph examinations as a requirement of parole, even in a therapeutic setting, was violative of parolees' Fifth and Fourteenth Amendment rights. South Dakota, along with virtually all other jurisdictions, mandates the frequent use of polygraph examinations for all sex offenders under threat of incarceration and revocation of parole. Will this Court allow this systemic violation of parolees' rights to stand?

As a condition of parole, petitioner was assigned to sex offender treatment with DPS and required to submit to eight polygraph examinations in 2015. Each of these exams required the completion of a questionnaire booklet demanding answers to questions involving more than thirty felonies and misdemeanors. During the polygraph itself, petitioner was required to answer questions involving the commission of felonies since the most recent successful exam. These questions involved sexual assault on a minor (SDCL 22-22-7), the viewing of child pornography (SDCL 22-24A-3), and solicitation of a minor for sexual purposes (SDCL 22-24A-5). This is standard treatment protocol for all sex offenders on parole or supervision in South Dakota. Neither the petitioner nor any other sex offender is offered immunity or any other legal protection for the results of the polygraph or for any statements made before, during, or after the exam.

Unlike *Von Behren*, who was allowed to refuse to answer any one of the four potentially incriminating questions on his polygraph, if petitioner refused to answer any question or to "fully participate" in the polygraph, he would be subject to immediate incarceration and possible revocation of parole.

Prior to each polygraph, the examiner presented a release form, which stated that the "client" was submitting to the polygraph voluntarily. Each time, petitioner informed the examiner that he was not taking the polygraph voluntarily, but only as

a condition of parole in violation of his Fifth Amendment rights. He also discussed this with his parole agent, who responded that he could refuse the polygraph and "turn in" his parole.

Coercive interrogation has long been held violative of the Fifth Amendment. See *Gardner v. Broderick*, 392 US 273, 88 S.Ct. 1913, 20 L.Ed 2d 1082 (1968) ("... the State's attempt to coerce self-incriminating statements by promising to penalize silence is itself constitutionally offensive."); *Garrity v. New Jersey,* 385 US 493, 87 S.Ct. 616; 17 L.Ed 2d 562; 1967 US LEXIS 2882 ("The question is whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer.")

Due to the widely acknowledged inaccuracies of the polygraph, their use in courts and most parole or supervision settings has been barred. *United States v. Scheffer,* 523 US 303, 140 L.Ed 2d 413, 118 S.Ct. 1261 (1998) HN3 ("Some studies has concluded that polygraph tests overall are accurate and reliable. Others found that polygraph tests assess truthfulness significantly less accurately, that scientific studies suggest the accuracy of the 'control question technique' polygraph is little better than could be obtained by the toss of a coin, that is, 50 percent.") Because of the mythology in popular culture involving the miraculous divination capable with polygraphs, the prejudice involved in their use is so great that "the results of a polygraph examination, the opinion of a polygraph examiner, or any

offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence. Mil.R.Evid. 707(a), Manual for Courts Martial." *Id.* HN1

Despite this, the use of polygraphs while on parole or supervision in an allegedly therapeutic setting has been allowed when certain legal protections are provided. "In recognition of the Superior Court of New Jersey, Appellate Division's judiciary's long-standing concerns about the inaccuracy of the machine-generated results produced by polygraph testing, the Appellate Division concludes that the New Jersey State Parole Board may not utilize such technical results in any evidential manner to support imposing sanctions or increased restrictions on the monitored individuals." *J.B. v. New Jersey State Parole Bd.,* 444 N.J. Super. 115; 2016 NJ Super LEXIS 14, HN 2. *J.B.* Also required *Miranda* warnings prior to polygraphs. *United States v. Stoterau*, 524 F.3d 988 (9th Cir 2008) HN 26 ("A district court may require, as a term of supervised release, that a defendant submit to polygraph testing, provided such condition comports with the requirements of 18 U.S.C. § 3583(d), but a defendant retains his Fifth Amendment rights during such testing."

However, *Von Behren* is the first case to directly address the use of the polygraph in an allegedly therapeutic parole situation where the defendant was required to answer potentially incriminating questions under threat of

incarceration. Under the fig leaf of treatment, imprisonment was somehow not a punishment for the results of a failed polygraph. "[H]aving parole violated for failing a polygraph and having parole violated for being terminated from treatment is a distinction without a difference." *Von Behren at* 1150

This was precisely the dichotomy which resulted in petitioner's revocation of parole. At no time during the entire period of petitioner's parole was there any investigation, allegation, evidence, or suspicion of any wrong-doing, other than the phantasms generated by the polygraph.

The petitioner was terminated from treatment and his parole revoked after more than three years based solely and exclusively on the basis of a polygraph report.

In 2013, a wholesale revision of South Dakota parole rules and policies altered the rules concerning the revocation of parole. Under these new guidelines, virtually the only infractions which require revocation are absconding from supervision and being terminated from sex offender treatment. Even conviction for new felonies while on parole no longer guarantees revocation.

With this threshold in mind, the protection of sex offenders, such as petitioner, from the coercion of polygraphs and the whims of treatment providers is vitally important to secure due process in the revocation process.

2. Did the District Court err in refusing to address the merits of a "colorable claim of a constitutional violation" based on procedural error when petitioner did not have meaningful access to legal materials and the entity maintaining his custody is responsible for both the constitutional violation and the lack of access to legal remedies?

Every filing of the petitioner has addressed the denial of meaningful access to legal materials through the intentional policies and practices of the South Dakota Department of Corrections.

At the time of the revocation of petitioner's parole, no prisoner in South Dakota Department of Corrections custody had direct access to case law. There were no reporters, supplements, or law journals in any of the facilities. It was impossible to Shepardize cases. The contract attorney program allowed inmates to spend a few minutes with counsel every month, however, the attorney was not allowed to research case law or draft pleadings.

Without an outside source, such as retained counsel or privately purchased law journals, inmates had no meaningful way to research any case more recent than the annual update of the South Dakota Codified Law texts. None of the other texts available were updated more than every few years.

South Dakota statutes provide that appeals of Board of Pardons and Paroles decisions must be pursued under the Administrative Appeals Act (SDCL ch. 1-26), within thirty days of the final order. While inmates at parole hearings are advised that Board hearings are not contested cases subject to judicial review, nowhere in any of the notices concerning parole is the appeal through 1-26 stated; nowhere in SDCL 1-26 does it cite parole decisions.

However, regardless of the inaccessibility of information regarding the proper method of challenging parole revocation, petitioner was denied access to case law. Petitioner was given a copy of *Prison Legal News* in violation of prison rules regarding the exchange of property, and read an article describing the Tenth Circuit holdings in *United States v. Von Behren*. This occurred in late September 2016, already past the thirty day deadline of SDCL ch. 1-26, and petitioner was unable to receive the text of the decision until October.

In the Report and Recommendation for the District Court dismissal, Magistrate Duffy states: "Mr. Brakeall cites a Tenth Circuit case which he alleges was not 'available to him' until October 2016 – after the thirty day deadline had passed for filing his administrative appeal... *Von Behren*, however was decided in May, 2016, 3 months before Mr. Brakeall's parole was revoked."

Had the petitioner access to a law library, updated references, or counsel,

this would be a meaningful and persuasive argument.

However, the actual conditions faced by inmates in South Dakota custody require that, if a case citation is discovered through one's own independent sources despite the impediments put in place by the Department of Corrections, one must wait two to four weeks to receive the case, with an additional two to four weeks to receive any of the cases cited in the original ruling. Prior to the Secretary of Corrections ending the program, the contract attorney came to Mike Durfee State Prison twice a month. At that time, he would pick up case law requests (a maximum of eight per month) and then bring the printouts when he came back two weeks later. In § 1983 and post-conviction relief, South Dakota Assistant Attorneys General would take advantage of this policy by citing a hundred decisions in a brief, knowing that the inmate would require a year to receive all the cases and default was all but inevitable.

Parolees housed at the CTP facility in Sioux Falls had no access to any legal materials whatsoever; the prison law library was in the maximum security facility and out of reach, and parole rules did not allow the petitioner to access the public library or any online resources. Even in a private home, the restrictions faced by the petitioner as a sex offender would have prevented all access to legal materials, due to restrictions barring access to the internet and public libraries for the term of

his parole.

If petitioner had had knowledge of the decision in *Von Behren* on the day of his revocation, there is every possibility that he still would have been unable to receive the text and prepare a parole appeal before the 30 day deadline.

At the time petitioner filed his original habeas petition with the District Court, the contract attorney program had been terminated for budgetary reasons and petitioner was left to his own devices to produce a response to the court's show cause and prejudice order. Like an English speaker in a foreign land, petitioner simply explained his position slowly and clearly, hoping that volume would overcome procedural default, since he had no understanding of the legal meaning of the phrase "cause and prejudice" and no source of instruction to clarify it for him. Petitioner's inability to properly frame his position and present it to the court denied the court the opportunity to address the recognized merits of his case.

This ignorance was a direct product of the South Dakota Department of Corrections policies which limit legal action by inmates through the systematic denial of meaningful access to legal materials.

The petitioner attacked this denial of access in *Brakeall v. Dooley,* 4:18-cv-04056-LLP, which is currently in mediation in the District of South Dakota. At the close of the trial, the court stated that he was not sure that the computer tablets with

a Lexis/Nexis legal application which the prison had issued to replace the physical legal texts in 2017 were, by themselves, sufficient legal access without the ability to consult trained legal counsel in the construction of proper pleadings and argument.

In the instant case, the District Court held, "The present case presents a colorable claim of a constitutional violation, but the nature of the case does not provide for a showing of new credible evidence of actual innocence. If the present case were to allow an exception to procedural default, another gateway to avoid procedural bar to the consideration of constitutional claims would have to be recognized." (Appendix B).

The South Dakota Department of Corrections has insured that few, if any, inmates who wish to challenge the revocation of their parole have meaningful access to case law or proper procedure and this allows the Department to profit from this ignorance.

Under SDCL 1-15-20, the Department of Corrections makes rules regarding parole standards, parole revocation, challenges to parole revocations, and controls access to information to challenge any of these determinations. This position of being the opposing team, referee, and owner of the field allows the Department of Corrections to perpetuate their pernicious violations of inmate and parolee

constitutional rights.

Without the intervention of this Court, the petitioner, and all other similarly situated people convicted of sex offenses and on parole or supervision, will be subject to routine threat and coercion as mandatory facets of maintaining their freedom and denied the resources to challenge this situation.

CONCLUSION

In the revocation of parole and the loss of his liberty, petitioner is innocent of any violations of the law or parole rules, but the procedural bars established by South Dakota prevent him from challenging this constitutional violation.

At this time, the Courts of Appeal are not in agreement as to the protections afforded to persons on parole or supervision. The protections afforded by the holding in *United States v. Von Behren* must extend to the entire nation.

The judgment below is a unique departure from the decisions of this Court that do not allow the State to profit from coerced self-incriminating statements.

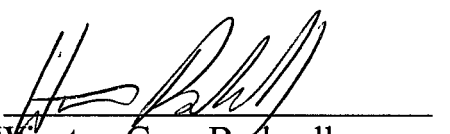
As such, it represents a breach in the wall erected by the Fifth and Fourteenth Amendments and the decisions of this Court that were designed to protect a citizen from being denied the limited liberty of parole or supervision by the Government through the use of statements involuntarily wrung from the

citizen.

This petition for writ of certiorari should be granted.

Dated this 5 day of April, 2019.

Respectfully submitted,



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