

18-9119
No. _____

Supreme Court, U.S.
FILED

NOV 26 2018

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

KIRBY GARDNER — PETITIONER
(Your Name)

vs.

LORIE DAVIS, Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

USCA - FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kirby Gardner #1003719
(Your Name)

Wynne Unit, 810 FM 2821
(Address)

Huntsville, Tx. 77349
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

#1: WHETHER THE FULL FAITH & CREDIT CLAUSE, & DOUBLE JEOPARDY CLAUSE PROHIBITS THE STATE OF TEXAS FROM REPROSECUTING & REIMPRISONING PETITIONER FOR AN EXPIRED 45 YR OLD STATE OF ILLINOIS CONVICTION THROUGH ITS SYSTEM OF PAROLE??

(Texas granted Petitioner parole for possession of <1g of cocaine, 4 months later it was superseded by imposed conditions for an expired 45yr old state of Illinois sex offense)

#2: DID MORRISSEY v BREWER, 408 U.S. 471 ('72) EXPRESSLY IMPLY THAT IN A PAROLE REVOCATION HEARING, THE CHARGING P.O. MAYBE APPOINTED TO ASSIST THE PAROLEE IN THEIR DEFENSE??

(Charging parole officer was appointed duty to assist Petitioner obtain requested medical document as mitigating evidence for removal of electronic monitor from his swollen leg to his harm)

#3: DO THE CUSTODY & CONTROL OF A STATE SYSTEM OF PAROLE INVOLVE SIGNIFICANT RESTRAINT TO ENTITLE A PAROLEE A LIBERTY INTEREST TO THE PERIOD OF PAROLE AS EARNED CREDITS SERVED ON THE SENTENCE FREE FROM RETROSPECTIVE FORFEITURE AS EXPOUNDED BY THIS COURT IN CALDER v BULL, 3 Dall. 386 (1798); JONES v CUMMINGHAM, 371 U.S. 236 ('68); WEAVER v GRAHAM, 450 U.S. 24 ('81); MILLER v FLORIDA, 482 U.S. 423 ('87); LYNCE v MATHIS, 519 U.S. 433 ('97)??

(Respondent apply state statute retrospectively to a prior conviction committed before statute's effective date to forfeit parole credits upon revocation that increases sentence beyond what by penal code is prescribed, and announced by trial court)

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

TABLE OF CONTENTS

| | |
|--|------------|
| OPINIONS BELOW | 1 |
| JURISDICTION..... | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 4, 5 |
| REASONS FOR GRANTING THE WRIT | 6, 7, 8, 9 |
| CONCLUSION..... | 10 |

INDEX TO APPENDICES

APPENDIX A

U.S. FIFTH CIRCUIT COURT OF APPEALS

APPENDIX B

HAVE BEEN UNABLE TO OBTAIN USDC DENIAL IN PART & DISMISSAL
IN PART FROM WESTERN DISTRICT OF TEXAS, 1:17-CV-00220

APPENDIX C

STATE OF ILLINOIS POLICE DEPT.

APPENDIX D

TEXAS CODE OF CRIMINAL PROCEDURE Ch. 62

APPENDIX E

REHEARING 5TH CIRCUIT DENIED

APPENDIX F

Appendix C & D are pages back-to-back
Petitioner do not have copier service available, documents
are from USDC 1:17-cv-00220 as labelled.

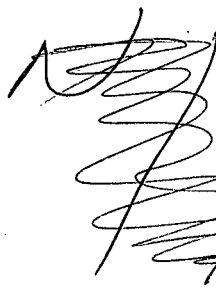
TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

| | |
|--|---------------|
| MORRISSEY v BREWER, 408 U.S. 471 ('72) - - - | K.G. 2, 7, 10 |
| GAGNON v SCARELLI, 411 U.S. 778 ('73) - - - | K.G. 6, 7 |
| BLACK v ROMANO, 471 U.S. 606 ('83) - - - | K.G. 6, 7 |
| CALDER v BULL; 3 Dall. 380 (1798) - - - | 8 |
| WEAVER v GRAHAM, 450 U.S. 24 ('81) - - - | 8 |
| LYNCE v MATHIS, 519 U.S. 433 ('97) - - - | 8 |
| MILLER v FLORIDA, 482 U.S. 423 ('87) - - - | 8 |
| JONES v CUNNINGHAM, 371 U.S. 236 ('63) - - | 8 |

STATUTES AND RULES

 K.G.

| | |
|----------------------------------|---|
| TEXAS CODE OF CRIMINAL PROCEDURE | |
| Chapter 62 - - - - - | 6 |
| (APPENDIX D) | |

OTHER

| | |
|---------------------------------|------|
| 5th AMENDMENT - - - - - | 6 |
| ARTICLE IV §§ 1, 2 - - - - - | 6, 7 |
| 14th AMENDMENT - - - - - | 8, 9 |
| ARTICLE I § 9. cl. 3 - - - - - | 8 |
| ARTICLE I § 10. cl. 1 - - - - - | 8 |

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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A 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 United States district court appears at Appendix _____ to the petition and is TRYING TO OBTAIN COPY

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished. USDC - WESTERN DISTRICT AUSTIN, TEXAS

1:17-cv-00220

☐ 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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was JULY 12, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: SEPTEMBER 9, 2018, and a copy of the order denying rehearing appears at Appendix 14.

☐ 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

U.S. CONSTITUTION:

Article I §9, cl. 3; §10, cl. 1;

No ex post facto law shall be passed

Article IV §§1, 2;

FULL, FAITH, and CREDIT shall be given in each state to the public Acts, Records, and judicial Proceedings of every other state.

The citizens of each state shall be entitled to all Privileges and Immunities of Citizen in the several States.

Amendment V;

No person shall be subject for the same offence to be twice put in jeopardy of life or limb.

Amendment XIV;

All persons born & naturalized in the United States & subject to the jurisdiction thereof, are citizens of the United States & 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 w/o due process of law; nor deny to any person w/in its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted for a December 15, 1999 Texas state-jail offense possession of a #10 rock of cocaine, enhanced to a 2nd degree felony.

Petitioner was sentenced to the maximum penalty of 20 yrs prescribed for a 2nd degree felony. Petitioner was released on parole January 19, 2010 after serving 10 yrs.

Four months later May 25th this parole was superseded into a sex offender case-load based on a 1973 State of Illinois conviction that was discharged in 1982. August 6, 2015 an electronic monitor was installed after release from an intermediate sanction facility. Petitioner removed the monitor after swelling of his lower leg caused numbness & pain enroute to Houston from Dallas on greyhound bus. Upon reporting August 28th Petitioner was arrested & held in Harris County, Tx. jail for revocation proceedings, Petitioner was 61 yrs of age.

Petitioner requested appointment of counsel to assist in obtaining medical document from independent health care contractor to the Texas prison system as mitigating evidence for removal of monitor. Petitioner had been medically treated daily for the swelling of his legs. Counsel was denied. Instead charging p.o. was appointed to assist obtain medical document which she failed to do which resulted in revocation of parole September 30, 2015.

Upon returning to the Texas prison system, Petitioner's original discharged date of December 15, 2019 was extended to March 2023 after 3 yrs parole credits were forfeited and added to the maximum 20 yr sentence based upon a 1991 prior conviction that was committed before state statute effective date that

authorizes forfeiture, PROSPECTIVELY, not retrospective!!

Both the USDC & Fifth Circuit held Petitioner failed to show a constitutional violation in the appointment of the charging p.o. to assist in obtaining medical document in his defense,

That the state of Texas could re prosecute and reimprison him through its system of parole for the expired/discharged 45 ye old State of Illinois conviction,

And, Petitioner was not legally entitled to his parole credits as time served on the sentence by use of a prior conviction committed before state statute effective date to increase his sentence beyond the prescribed penal code punishment range for his holding offense.

(5)

~~2-1-12~~ K.G

- REASONS FOR GRANTING THE PETITION -

QUESTION #1:

No state should be allowed to re prosecute & reimprisoned a citizen on a conviction from a sister state that has long been discharged & expired through its system of parole.

This is NOT a case of enhancement by prior conviction!!

The state of Texas imposed conditions of parole May 25, 2010 on a 1973 state of Illinois conviction, Cause No. 73-cv-22 Marion County Illinois, that expired/discharged in 1982. Appendix C

Texas revoked this parole & reimprisoned Petitioner September 30, 2015.

5th AMEND. U.S. CONST.

"No person shall be subject for the same offense to be twice put in jeopardy of life or limb."

ARTICLE IV §§ 1, 2 U.S. CONST.

"FULL FAITH & CREDIT shall be given in each state to the public Acts, Records, & judicial Proceedings of every other state. The citizens of each state shall be entitled to all Privileges & Immunities of citizens in the several states."

The public Acts, Records, & judicial Proceedings of the state of Illinois @ Appendix C shows Petitioner's 1973 sex conviction was discharged in 1982. That he is NOT under any type of restraint or registrant from the conviction to convey JURISDICTION upon the state of Texas.

Texas Code of Criminal Procedure chapter 62 governs the duty to register a sex conviction in Texas.

The chapter codified an exemption from the duty to register upon a sub-class of out-of-state convictions based on the laws of the convicting state. Appendix D

This provision incorporates the FULL FAITH & CREDIT Clause of Article IV § 1, 2 for a state created liberty interest, which would entitle Petitioner to the Privileges & Immunities of Illinois law from being twice put in jeopardy of life & limb for the same offense through Texas system of parole.

* NOTE THIS REVOCATION ^{IS} ~~NOT~~ BASED ON CONDITIONS FOR OFFENSE ORIGINALLY GRANTED PAROLE *

QUESTION #2:

No where in MORRISSEY v BREWER, 408 U.S. 471 ('72); GAGNON v SCARELLI, 411 U.S. 778 ('73); BLACK v ROMANO, 471 U.S. 606 ('83) did this U.S. Supreme Court hold it constitutional to appoint the charging p.o. to assist a parolee in their defense in a parole revocation proceeding.

The Court in MORRISSEY v BREWER held that a parolee under the Due Process Clause must be allowed to present documented evidence that mitigate the need for revocation. 408 U.S. @ 488

MORRISSEY v BREWER also held the right to a "neutral detached hearing body." 408 U.S. @ 489

Texas parole revocation scheme are heard by a fellow parole officer, a co-worker from the same office, district of the charging p.o. In some cases they are related by blood, marriage, and consent making the process inherently

bias & prejudicial.

QUESTION #3:

ARTICLE I §9. cl. 3, §10. cl. 1 U.S. CONST.

"No State shall pass any ex post facto law"

This U.S. Supreme Court long ago expounded this to mean, "No State may increase punishment beyond what was prescribed when the crime was committed." CALDER v. BULL, 3 Dall. 380, 390 (1798); WEAVER v. GRAHAM, 450 U.S. 24, 30 ('81); LYNCE v. MATHIS, 519 U.S. 433, 440 ('97); 14th AMEND.

Petitioner state-jail felony was enhanced by a 1991 prior conviction to a 2nd degree felony. The maximum prescribed penalty for a 2nd degree felony is 20 yrs. Petitioner was sentenced to the maximum prescribe 20 yrs, Dec. 15, 1999.

"A state statute is ex post facto when it retrospectively attaches legal consequences to acts completed before its effective date & disadvantage an individual when it lengthen the period that must be spent in prison."

WEAVER v. GRAHAM, 450 U.S. 24 ('81); MILLER v. FLORIDA, 482 U.S. 423 ('87); 14th AMEND.

Respondent attached legal consequences to the same 1991 prior conviction when a 1996 state law was retroactively applied to the 1991 prior conviction to forfeit parole credits to be served over again, which lengthens the period Petitioner must spend in prison 3 yrs over the maximum 20 yr penalty prescribed for his state-jail felony when it was committed, & announced in court by trial judge.

* THIS 1996 STATE STATUTE WAS ENACTED
TO OPERATE PROSPECTIVELY *

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 w/o due process of law; nor deny to any person w/in its jurisdiction the equal protection of the laws.
14th AMEND., U.S. CONST.

This Court in Jones v Cunningham, 371 U.S. 236 ('63) held state parolees are "in custody" during period of parole by which they may challenge the legality of their sentence as parole involves significant "custody & control" on a parolee's liberty for writ of habeas corpus.

Thus a determination must be made whether state parolees are entitled to the days served on parole as earned credits served on the sentence same as time served in confinement free from forfeiture to be served over again, as a sentence is continuous & must not be served in installments.

The scheme of the Texas state statute that forfeits parole credits is based upon "having been convicted of a prior felony" even though the statute does not apply to the holding offense.

Thus the statute subjects a person for a second time for the same offense to the deprivation of life, liberty, & property. 5th & 14th AMEND., U.S. CONST.

- CONCLUSION -

No State should be allowed to re prosecute & reimprison a person on an expired/discharged conviction from a sister state through its system of parole. ①

The State of Texas parole revocation proceedings violates the Due Process Clause as determined by this Court in MORRISSEY v BREWER, 408 U.S. 471 ('72) when it allows the charging po. to be appointed to assist a parolee in their defense, and disallows a "neutral detached body" to hear revocation proceedings.

Respondent's retro application of the 1996 state law is ex post facto. A state parolee is entitled to their parole credits as time served on the sentence as a sentence entails significant "custody & control" as well as being continuous & cannot be served in installments.

ARTICLE I § 9, cl. 3, § 10, cl. 1; 14th AMEND., U.S. CONST.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

① Article IV §§ 1, 2; 5th & 14th
AMENDS., U.S. CONST.

Respectfully Submitted!

Kirby Gardner

Petitioner

Kirby Gardner #1003719

Wynne Unit

810 FM 2821

Huntsville, Tx. 77349

(10)