No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

DENNIS GORDON,

Petitioner,

v.

JEFF PREMO,

Respondent.

On Petition for Writ of Certiorari To
The United States Court of Appeals for The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Anthony Bornstein
Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

QUESTIONS PRESENTED

Does Dennis Gordon's *ex post facto* challenge to the eight-year increase in the interval between his parole release hearings fall within the Federal Court's habeas corpus jurisdiction under 28 U.S.C. § 2254 and associated statutes?

Alternatively, did the Ninth Circuit erroneously refuse to remand his case so that the district court could construe it as a § 1983 action?

TABLE OF CONTENTS

Table of Authorities

Federal Cases **Page(s)**

Federal Statutes

State Cases

U.S. Constitution

INDEX TO APPENDICES

The petitioner, Dennis Gordon, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the denial of habeas corpus relief. (Appendix A).

Opinions below

The United States District Court for the District of Oregon denied and dismissed Mr. Gordon's petition for Writ of Habeas Corpus that he filed pursuant to 28 U.S.C. § 2254. (Appendix B). The District Court issued a Certificate of Appealability. (*Id.*, pp. 13 & 14). In a Memorandum decision issued on March 14, 2019, the United States Court of Appeals for the Ninth Circuit affirmed the denial of relief. (Appendix A).

Jurisdictional statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Ex Post Facto Clause of the United States Constitution states in relevant part: "No state shall . . . pass any . . . ex post facto Law. . . .

28 U.S.C. § 2254 provides that:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2243 directs that courts sitting in habeas "shall . . . dispose of the matter as law and justice require."

28 U.S.C. § 2241(c) sets forth the following provision.

The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

Statement of the case

Statement of facts

In 1976, Mr. Gordon pled guilty, in the Circuit Court of Oregon, to murder and rape. He was sentenced in the trial court to an indeterminate life term on the murder conviction and to a consecutive twenty year indeterminate term on the rape conviction. (Appendix B, p. 2 [1]). "Regardless of the length of an indeterminate sentence, under [Oregon law], "it is the [Board of Parole] that determines the actual duration of imprisonment." . . . In other words, for prisoners sentenced under the matrix system, the Board, not the court, determines the actual duration of imprisonment." *Hamel v. Johnson*, 330 Or. 180, 183, 998 P.2d 661, 665 (2000)

[1] The Excerpts of Record filed in the Ninth Circuit contain record references.

"Historically, Oregon inmates have received parole consideration hearings every two years. However, in 2009, the Oregon legislature amended [state law] to allow the Board discretion to postpone an inmate's parole consideration by up to 10 years. The Board applied this new law to Petitioner in 2011 when it deferred his release by 10 years." (Appendix B, p. 2).[2]

Mr. Gordon's habeas corpus case stems from a parole consideration hearing (or "exit interview") before the Oregon Board of Parole that took place on February 9, 2011. At the conclusion of the hearing, the Board found that it was not reasonable to expect that Mr. Gordon would be granted a firm release date before ten years from his current projected release date. Therefore, the Board deferred his projected release date and established a new projected release date in August of 2021. (Appendix B, pp. 2-3). Thereafter, the Board issued a Board Action Form in which it found as follows:

> The Board has received a psychological evaluation on inmate . . . .
>
> Based on the doctor's report and diagnosis, coupled with all the information that the Board is considering, the Board concludes that the inmate suffers from a present severe emotional disturbance that constitutes a danger to the health or safety of the community. The Board has considered this matter under the substantive standard in effect at the time the inmate opted into the matrix system, 08/01/1984, and all other applicable rules and laws.
>
> The Board further finds that it is not reasonable to expect that you will be granted a firm release date before 10 years from your current projected release date. Therefore the Board is deferring your projected release date and

[2] Oregon's parole consideration process is further described in the following cases: *Brown v. Palmateer*, 379 F.3d 1089 (9th Cir. 2004); *Hess v. Board of Parole and Post-Prison Supervision*, 514 F.3d 909 (9th Cir. 2008).

> establishing a new projected release date of 08/15/2021 following a total of 551 months. . . .

(App. B, pp. 2-3).

Mr. Gordon sought administrative review of the ten-year deferral but the Board rejected his *ex post facto* claim. (Appendix B, pp. 3 & 4).

Mr. Gordon sought judicial review of the Board's action in the Oregon Court of Appeals. He again contended that the ten-year deferral, permitted by the change in Oregon law, violated the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution. (Appendix B, p. 4). The Oregon Court of Appeals issued a written opinion in which it affirmed the Board's action based on the Board's finding that Mr. Gordon suffered from a "present severe emotional disturbance" and "that it was not reasonable to expect that petitioner would be granted release before 10 years from his current projected release date." The court did not specifically address the *ex post facto* claim in its decision. *Gordon v. Board of Parole & Post-Prison Supervision*, 267 Or. App. 126, 340 P.3d 150, 151 (2014). Mr. Gordon's petition for review was denied by the Oregon Supreme Court. (Appendix B, p. 4).

Mr. Gordon filed his federal habeas corpus petition asserting that the Board violated the constitutional protection against *ex post facto* punishment. First, the district court found no jurisdiction to decide the claim, writing:

> Were the court to find an . . . ex post fact post facto violation in this case, Petitioner would not be entitled to earlier release. Instead, he would only be relieved from the 10-year parole cycle of which he complains. In such a scenario, although the Board would be obligated to conduct parole review

> hearings every two years, it could nevertheless continue to exercise its discretion to deny Petitioner release to parole if appropriate. In this respect because success in this action would result only in speedier parole consideration and not necessarily Petitioner's speedier release, his claim does not "lie[] at the core of habeas corpus." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

(Appendix B, pp. 4-5). The Court then found that even it if the claim was cognizable under 28 U.S.C. § 2254(d), Mr. Gordon would not be entitled to relief. (Appendix B, pp. 12-13).

The Ninth Circuit affirmed, writing:

> The relief requested by Gordon would merely switch him from a ten-year parole review cycle back to a two-year cycle. The Board could continue to exercise its discretion to deny Gordon parole regardless of this relief. Since the relief would not "necessarily lead to an earlier release," it is not "within the core of habeas" and this court lacks jurisdiction over his § 2254 petition. *Nettles v. Grounds*, 830 F.3d 922, 927-28, 935 [9th Cir. 2016].
>
> The proper avenue for Gordon's claim is 42 U.S.C. § 1983. The court in *Nettles* explained that even though a claim was "not cognizable in habeas," a court of appeals "must still consider whether the district court may construe [the] habeas petition as pleading a cause of action under § 1983." *Id.* at 935. It continued:
>
> > If the complaint is amenable to conversion on its face, meaning that it names the correct defendants and seeks the correct relief, the court may recharacterize the petition so long as it warns the pro se litigant of the consequences of the conversion and provides an opportunity for the litigant to withdraw or amend his or her complaint.
>
> *Id.* at 936 (quoting *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005)). The court of appeals in *Nettles* then vacated the district court's opinion and remanded the case so that the district court could consider whether the petition was convertible. *Id.*
>
> * * * [Gordon's] petition is not convertible on its face since, at a minimum, he has named the wrong defendants. Therefore, we will not remand the case, and, instead, we affirm the district court's denial of Gordon's § 2254 petition based on a lack of jurisdiction.

(Appendix A, pp. 2-3); *Gordon v. Premo*, 757 Fed. Appx. 627, 628 (9th Cir. 2019).

Reasons this Court should hear the case

A. The Ninth Circuit's jurisdictional holding was clearly wrong.

Contrary to the Ninth Circuit's holding, the federal court maintains jurisdiction to hear Mr. Gordon's *ex post facto* claim as it falls within the ambit of the habeas corpus statute. The "controlling inquiry" in a case of this type is whether the retroactive change in parole law creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes" by a "matter of degree." *Garner v. Jones*, 529 U.S. 244, 250 (2000) (citation omitted). As such, because of the nature of the constitutional question, Mr. Gordon need not show that he would, undoubtedly, be released sooner absent an *ex post facto* violation. Here, the substantial deferral of the interval for his "Exit Interview," by an increase of eight-years, created a "sufficient risk" of increasing the duration of his imprisonment. This is especially true given that the contemplated opportunity for interim hearings is not meaningful due to the lack of access to a new psychological evaluation for any such interim release consideration.

Under this Court's jurisprudence, there is no jurisdictional impediment to consideration of Mr. Gordon's *ex post facto* claim. After all, *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), was itself a federal habeas corpus case, brought under 28 U.S.C. § 2254(d), raising a very similar issue. *Id.* at 504. In *Morales*, this Court did not find any jurisdictional defect to a constitutional merits ruling in that case. *See* 514 U.S. at 514.

Morales involved a challenge to a later-enacted California law that allowed the state's Board of Prison Terms to decrease the frequency of parole suitability hearings. 514 U.S. at 501. This Court squarely reached the merits without raising any jurisdictional questions. Consequently, controlling Supreme Court authority in no way requires that the petitioner challenging such a change in state parole law demonstrate that he would have certainly been released earlier but for the change.

In this vein, this Court has also emphasized that "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause[.]" *Garner v. Jones*, 529 U.S. at 253 (citing *Weaver v. Graham*, 450 U.S. 24, 30-32 (1981)). The very nature of discretion in the parole context is that its exercise might hasten the eligible inmate's release from prison or it might result in no such acceleration. The corollary of that pronouncement is that such a violation would still be a valid basis for habeas relief.

As recited above, in Mr. Gordon's case, the Circuit relied on *Nettles v. Grounds*, to hold that it lacked jurisdiction over the *ex post facto* claim. For the reasons set forth in Judge Berzon's comprehensive dissenting opinion in *Nettles*, the majority opinion in that case was wrongly decided. Judge Berzon's dissent exhaustively reviewed decisions of this Court that affirm the central fact that a certainty of speedier release is not essential to habeas jurisdiction. For example, in one passage, Judge Berzon points out the following:

> ... *Boumediene v. Bush*, 553 U.S. 723 (2008), a case the majority does not mention, affirmatively indicated that habeas petitions may be brought for relief other than speedier release from confinement. *Boumediene* considered the core capacities that a tribunal must retain to maintain an adequate substitute for a writ of habeas corpus. *Boumediene* noted that while a court

> "must have the power to order the conditional release of an individual unlawfully detained[,] ... release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." *Id.* at 779[.]
>
> The year after *Boumediene*, and just two years before *Skinner*, the Supreme Court characterized *Dotson* as holding that "prisoners who sought new hearings for parole eligibility and suitability need not proceed in habeas"—which would be very odd phrasing if *Dotson*'s import was that prisoners with such claims *cannot* proceed in habeas. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 66 (2009) (emphasis added). And throughout these cases, the Court has asked consistently whether a claim "lies at the core of habeas corpus," (emphasis added) phrasing that, as I observed earlier, necessarily indicates there is some area beyond this "core" in which a habeas claim may also lie. *See, e.g., Dotson*, 544 U.S. at 79, 2 (quoting *Preiser v. Rodriguez*, 411 U.S. 487 (1973) (internal quotation marks omitted).

Nettles, 830 F.3d at 943 (Berzon, J, dissenting) (citations modified).

Judge Berzon explains that the Majority's approach, "if taken seriously will foreclose habeas relief on many procedural claims." *Id.* at 939. For all kinds and categories of claims heard on federal habeas review, there is no certainty of a more positive outcome if the petitioner wins their case. This holds true even for violations occurring at the criminal trial itself. For example, if a petitioner establishes a violation of their right to effective assistance of trial counsel, they will receive a new trial or sentencing. However, "it will almost always be the case that the proceeding could have resulted in the same outcome even absent the alleged defect." *Id.* (Berzon, J., dissenting).

Judge Berzon then explained how the Majority, in *Nettles*, failed to respect *Edwards v. Balisok*, 520 U.S. 641 (1997):

> *Edwards v. Balisok*, a case the majority discusses, is another relevant example and hints at the implications of the majority's standard. . . . In

> *Balisok*, the Supreme Court required the respondent, Balisok, to bring his due process challenge to the prison's disciplinary procedures under the habeas statute, rather than § 1983. 520 U.S. at 648. Balisok did not dispute the result of his disciplinary hearing, admitting that the prison likely could revoke his good-time credit in a procedurally proper hearing. *Id.* at 644–45, 647–48. However, because Balisok's procedural challenges "impl[ied] the invalidity of the punishment imposed," he was required to proceed in habeas, even though the validity of his underlying judgment of conviction was not at stake, and even though success on his claim would not necessarily have resulted in speedier release. *Id.* at 648. The majority's standard apparently would leave similarly situated plaintiffs without a remedy, barring them from seeking relief using the only route the Supreme Court left open

830 F.3d at 940 (citations modified).

Next, the *Nettles* decision is fundamentally at odds with *Swarthout v. Cooke*, 562 U.S. 216 (2011). In *Swarthout*, this Court addressed what procedures are constitutionally required in association with a California statute that requires its parole board to "'set a release date unless it determines that . . . consideration of the public safety requires a more lengthy period of incarceration.'" *Id.* at 216–17 (quoting California statute). This Court reiterated that statutes governing inmates' release on parole ensure that inmates receive "adequate process" through "an opportunity to be heard" and "a statement of the reasons why parole was denied." *Id.* at 220. This Court stated that the California inmates had "received at least this amount of process: They were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied." *Id.* "That," this Court held, "should have been the beginning and the end of *the federal habeas courts' inquiry* into whether [the inmates] received due process." *Id.* (emphasis added). Clearly, one

premise of the decision is that the writ of habeas corpus lies for a prisoner's challenge regarding a deprivation of those rights.

Decisions from other circuits similarly find no jurisdictional impediment to habeas corpus relief when *ex post facto* violations do not necessarily compel earlier release. For example, in *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003), the Third Circuit found changes to Pennsylvania parole laws that were interpreted by that state's parole board as requiring more emphasis on public safety fundamentally altered the board's process for reviewing parole applications. Those changes offended the Ex Post Facto Clause when applied retroactively. Consequently, under the federal court's order, the inmate was entitled to have the board decide his parole application based on factors in use by the board at the time of his conviction and commutation. The Court also found that the negative impact requirement for an *ex post facto* violation was satisfied because *the likelihood of parole* existing at the time of the petitioner's conviction had been reduced. In its conclusion, the Court stated that "release on parole is a Board policy *presumption*, and parole should be granted *unless countervailing negative factors affirmatively outweigh* reasons supporting release. *Id.* at 393 (emphasis added). Thus, a certainty of earlier release absent the violation was not a legal prerequisite for habeas jurisdiction.

B. Alternatively, the Circuit should have remanded the case for conversion to a § 1983 action.

Alternatively, in Gordon's case, the Circuit should have remanded the case to the district court so that it could consider whether to construe his habeas challenge to the

Board's action as one brought under § 1983. His case is similar to *Garner v. Jones*, *supra.* In *Jones*, a Georgia inmate filed a § 1983 action alleging that, under an amended state statute, the scheduling of his parole hearings by the Board of Pardons and Paroles violated the Ex Post Facto Clause. This Court held that the retroactive application of the amended law, changing the frequency of required reconsideration hearings for inmates serving life sentences, from every three years to every eight years, did not necessarily or facially violate the *ex post facto* prohibition. However, this Court also held that the lower court should consider the Board's internal policy statement regarding expedited consideration in the event of a change in circumstances.

In the same way, in this case, the district court should be able to consider like evidence in the context of a § 1983 action. Mr. Gordon, should be allowed to make his case to the district court why, in the alternative, the case should be allowed to proceed as a § 1983 action, similar to the case in *Jones*.

In one post-*Jones* case, the D.C. Circuit allowed a case to go forward as the plaintiffs had alleged a colorable *ex post facto* claim. As the case was brought against the United States Parole Commission, it was presumably a *Bivens* action. Still, the outcome is instructive for purposes of this case. The D.C. Circuit held:

> Because this case comes to us as an appeal from the dismissal of a complaint, the only question before us is the one we have answered in the affirmative: Have the plaintiffs stated an ex post facto claim that is plausible? We therefore have no occasion to consider what additional evidence—if any—beyond the facial differences between the 2000 and 1972 Guidelines the plaintiffs must develop on remand to prove their claim. Nor do we have occasion to consider what evidence the Commissioners must marshal in

> defense of their retroactive application of the 2000 Guidelines. As is appropriate, we leave those issues for consideration, in the first instance, by the district court.

Daniel v. Fulwood, 766 F.3d 57, 66 (D.C. Cir. 2014). The same should hold true in the instant case. The District Court should, at a minimum, review Gordon's case, with appropriate fact development, in the context of a § 1983 action. *See also Wilkinson v. Dotson*, 544 U.S. 74 (§ 1983 is available to challenge parole board procedures used to deny parole eligibility that would not necessarily vitiate the legality of prisoner's confinement).

Conclusion

That something falls outside "the core" of something does not mean it is outside the larger structure as well. The earth, for example, consists of the core, the mantle and the crust. Mr. Gordon's constitutional challenge, if not inside the core of habeas, rests firmly within its mantle. The Writ encompasses such a challenge.

For the foregoing reasons, this Court should grant the writ of certiorari. Alternatively, the Court should summarily remand the case with instructions to remand to the district court for consideration as a § 1983 action.

DATED this 12th day of June, 2019.

Anthony Bornstein
Assistant Federal Public Defender
Attorney for Petitioner