

No. \_\_\_\_\_

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IN THE SUPREME COURT  
OF THE UNITED STATES

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MICHAEL W. JENKINS,

Petitioner,

v.

BRIGITTE AMSBERRY,

Respondent.

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On Petition For Writ Of Certiorari To  
The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the Ninth Circuit's ruling, denying a Certificate of Appealability to a habeas corpus petitioner, contravene the statutory standard, under 28 U.S.C. §2253 (c) (2), for issuance of such a certificate, as set forth in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)?

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The petitioner, Michael W. Jenkins, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 19, 2019. (Appendix A).

### **Jurisdictional Statement**

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

### **Constitutional and Statutory Provisions**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states in relevant part: “No state shall . . . deprive any person life, liberty, or property without due process of law.” U.S. Const. Amend. XIV.

28 U.S.C. §2253(c)(2) setting forth the statutory standard for issuance of a certificate of appealability in a habeas corpus case filed under 28 U.S.C. §2254.

### **Statement of the case and opinions below**

This case involves a federal habeas corpus petitioner’s challenge to an adverse action of the Oregon Board of Parole. After exhausting his state remedies, the petitioner filed a petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254. His case was filed in the United States District Court for the District of Oregon. His case raised a claim for relief grounded in the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

On July 28, 2019, the District Court denied the petition, dismissed the case and declined to issue a Certificate of Appealability. (Appendix C). On the latter point, the District Court found that Mr. Jenkins’ due process claim failed to meet the statutory

standard for issuance of a Certificate under 28 U.S.C. §2253(c) (2). (Appendices B and C). Mr. Jenkins then filed a Notice of Appeal.

On December 19, 2019, a two-judge panel of the United States Court of Appeals for the Ninth Circuit also denied a Certificate of Appealability. Like the district court, the Ninth Circuit found that the petitioner's case had not met the statutory standard for issuance of a Certificate. (Appendix A) (citing 28 U.S.C. §2253(c) (2) and *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Mr. Jenkins files this petition to seek review of that ruling. He contends that the denial of the certificate raises "important federal question in a way that conflicts with" this federal statute and this Court's decision in *Slack*.

### **Reasons this Court should grant certiorari**

Summarizing his argument in the Oregon Court of Appeals, Mr. Jenkins made the following argument under the United States Constitution:

The [Oregon Parole] Board lacked jurisdiction to conduct a future disposition hearing and establish a new release date because (1) petitioner was not on parole and subject to parole conditions because he had not been released from custody; and (2) once petitioner began serving his [consecutive state] guidelines sentence, the [Oregon] Department of Corrections (DOC) and not the board had jurisdiction over petitioner. Moreover, the board's act of conducting a future disposition hearing and denying petitioner release for an additional 15 years when it lacked jurisdiction to do so violated petitioner's Fourteenth Amendment right to due process.

He sought the writ of habeas corpus on that basis.

The United States District Court's decision sets forth the procedural history of the case. (Appendix C, pages 1-3).

Federal courts have authority, in a habeas corpus case, to decide whether a state parole board had jurisdiction over a state prisoner. *See, e.g. Ward v. Howes*, 08-13051, 2011 WL 4527786, at \*14 (E.D. Mich. Sept. 29, 2011) (finding that the petitioner, in that case, could not establish that the Michigan Department of Corrections and the Michigan Parole Board lacked jurisdiction over him). *See also Elrod v. Swarthout*, 2012 WL 28660, at \*4 (E.D. Cal. Jan. 5, 2012) (Magistrate Judge ruling, addressing, but rejecting, on the merits, a state prisoner's claim that the California Board of Parole Hearings lacked jurisdiction or "authority to review his parole suitability and fix his release date . . . ").<sup>1</sup>

Next, a state court's arbitrary disregard of state sentencing law and imposition of an unauthorized sentence may violate the defendant's due process rights. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, (1980); *Whalen v. United States*, 445 U.S. 684, 689-90 n. 4 (1990).<sup>2</sup> In *Ballard v. Estelle*, 937 F.2d 453 (9th Cir. 1991), the Ninth Circuit summarized the law on this point:

State laws may give rise to liberty interests protected by the Fourteenth Amendment. *Board of Pardons v. Allen*, 482 U.S. 369, 381, (1987) (statute requiring defendant's release on parole when eligible and when reasonable

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<sup>1</sup> In another case, the Court considered such a claim, but found that it was not exhausted. *Miles v. Williams*, 386 F. Supp. 2d 582 (D. Del. 2005) (petitioner claimed that sought federal habeas relief, contending that parole board lacked jurisdiction over him at time of revocation). Alternatively, the situation is analogous to a federal court inquiring whether a military tribunal has jurisdiction. *Jackson v. Sanford*, 79 F. Supp. 74, 76 (N.D. Ga. 1947). The writ would issue too if an immigration court lacked jurisdiction over an individual.

<sup>2</sup> Mr. Jenkins' state-court habeas action tracked this formulation of constitutional law. ("Plaintiff claim[s] that the arbitrary and capricious action that was perpetrated against him . . . infringed upon his vested liberty interest in his scheduled parole release date of February 07, 2014. . . .").



probability that no harm will result creates a liberty interest); *Hewitt v. Helms*, 459 U.S. 460, 466, (1983); *Hicks v. Oklahoma*, 447 U.S. 343, 346, (1980) (statute that vests sentencing discretion with the trier of fact creates a liberty interest). Misapplication of these laws that lead to deprivations of those liberty interests by state institutions may be reviewed in federal habeas corpus proceedings.

*Id.* at 456 (citations modified).

In *Walker v. Deeds*, 50 F.3d 670 (9th Cir. 1995), the Ninth Circuit applied this reasoning to invalidate a Nevada sentence that did not strictly comply with state law. In *Walker*, the Court specifically held that sentencing the defendant as a “habitual criminal” without making the required finding that habitual offender status was “just and proper” under Nevada law violated the defendant’s due process rights. 50 F.3d 670 (9th Cir. 1995).

In the most relevant passage, the Court wrote:

In *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980), the Supreme Court held that state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. Therefore, when a state has provided a specific method for determining whether a certain sentence shall be imposed, “‘it is not correct to say that the defendant’s interest’ in having that method adhered to ‘is merely a matter of state procedural law.’” *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir.1993) (citing *Hicks v. Oklahoma*). Based on *Hicks*, this court found that state law requiring that the Washington Supreme Court “review and make particular findings before affirming [a] death sentence” created a constitutionally protected liberty interest. *Campbell v. Blodgett*, 997 F.2d 512, 522 (9th Cir.1992).

50 F.3d at 672 (citations modified). *See also Moore v. Parke*, 148 F.3d 705 (7th Cir. 1998) (invalidating habitual offender determination based on state court’s failure to prove sequencing of prior offenses and convictions as required by Indiana law).

As in *Walker*, and the above-referenced cases, Mr. Jenkins similarly contends that the Oregon Board of Parole disregarded Oregon law and procedures on the scope of its jurisdiction and authority.

Mr. Jenkins had a vested liberty interest, protected by the Fourteenth Amendment Due Process Clause, in his 2014 release date. The action of the Oregon Board of Parole revoking his parole and, later, in denying his re-release, violated his right to due process.

Mr. Jenkins points out that, during the relevant time period, he was always in prison and therefore never became a parolee. Consequently, the Board of Parole never had authority to allow a *Morrissey* hearing, or the ensuing Future Disposition hearing, to take place.<sup>3</sup> As such, the Board was without jurisdiction to implement the subsequent adverse action against him, *to wit*, denying him rerelease.

This proposition of law is clearly established in Oregon law. In *State v. Ludwig*, 218 Or. 483, 486-487, 344 P.2d 764, (1959), the court stated “*A parole, briefly stated, is a release from jail, prison or other confinement after actually serving part of the sentence.*” (emphasis added); *See also Bailleaux v. Cupp*, 16 Or. App. 573, 520 P.2d 483 (1974) (quoting *Ludwig*). *Compare Boyd v. Bd. of Parole*, 541 P.2d 1068, 1069 (Or. App. 1975) (“We hold the *Morrissey* and statutory requirements did not apply to petitioner because he was not in parole status.”).

At the very least, *Shelby v. Board of Parole*, 244 Or. App. 348, 260 P.3d 682 (2011) is in tension with *Ludwig* and *Bailleaux*. Moreover, although the *Shelby* court did find that

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<sup>3</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972).

the petitioner, in that case, remained on parole despite his incarceration on his consecutive sentence, the Court's specific conclusion in that case was that the petitioner "did not continue to earn good time when he was released "on parole . . . on his indeterminate sentences . . . and began serving his consecutive sentences for his [later guidelines] conviction." 244 Or. App. at 354, 682.

The Court of Appeals' decision in *Wyatt v. Board of Parole and Post-Prison Supervision*, 230 Or. App 581, 216 P.3d 926 (2010), also supports Mr. Jenkins' position. In *Wyatt*, the Court concluded that the petitioner could not challenge a supervision condition that was included in a Board Action Form ("BAF") because the conditions had not yet been imposed. *Id.* at 584-86. The petitioner in *Wyatt* had served a sentence and been released onto post-prison supervision when he violated the terms of that supervision. *Id.* at 584. The Board ordered that he serve a 180-day sanction for the violation. *Id.* The order included a statement identical to the statement in BAF 16 in this case. It stated that any general and special conditions in the order were listed for informational and tracking purposes, and that actual supervision conditions would be imposed in a subsequent Order of Supervision. *Id.* The order also included a special condition prohibiting contact with certain persons. *Id.*

On judicial review, Wyatt challenged the special condition that prohibited his contact with the named persons. *Id.* The Oregon Court of Appeals concluded that he could not challenge that specific condition because the order did not actually impose the condition that he was attempting to challenge on review. The Court wrote:

Here, the board did not actually impose the conditions that petitioner challenges in the board's order, nor did it uphold those conditions on administrative review. Rather, any such conditions will be established in a separate written order that will be provided to petitioner on his re-release from prison. ORS 144.102(1).1. The order merely advised petitioner that the board intended to impose the challenged conditions in a subsequent order of supervision conditions. Thus, although petitioner was adversely affected by the order to the extent that he was ordered to serve an incarceration sanction, the board did not err in the manner asserted by petitioner on judicial review, and this court therefore cannot provide the relief that he seeks under ORS 183.482(8). Petitioner will have an opportunity to seek judicial review of the challenged conditions if and when the board imposes them in an order establishing supervision conditions upon his re-release.

*Wyatt*, 230 Or. App. At 584-85, 216 P.3d at 928 (Or. App. 2009). *Wyatt* establishes that the Board imposes on conditions of release on an offender when that offender is released from custody, and through an order of supervision that is provided at the time of release. Conditions that Board establishes prior to release from custody are provided for “informational and tracking” purposes. *See* 230 Or. App. at 583, 216 P.3d at 927.

Here, as Mr. Jenkins was never released from prison, the Oregon Board of Parole never had jurisdiction or authority to conduct the *Morrissey* hearing or the ensuing Future Disposition Hearing. As a result, the sanction imposed on the still-incarcerated Mr. Jenkins for a “parole violation” was unconstitutional. Again, he had never been released from confinement. Therefore, there was no authority or jurisdiction held by the Board to conduct a *Morrissey* hearing and to act adversely to him.

As Mr. Jenkins argued in his brief on judicial review from the Board’s action:

OAR 256-70-045 gives the board authority to schedule a future disposition hearing for an inmate who has been returned to confinement after parole has been revoked to “establish the future disposition” of the inmate. OAR 254-70-042(2), in turn, provides the board with authority to find aggravating

factors and establish a further term of confinement. The board's authority under those rules is premised upon an inmate being released from custody and placed on parole, subject to parole conditions. Here, petitioner had not been released from custody onto parole. He had completed the prison term for his indeterminate sentence and begun serving his guidelines sentence. As a result, the board lacked jurisdiction to revoke petitioner's parole, hold a future disposition hearing, and establish a new parole release date. Moreover, the actions violated the petitioner's right to due process.

He further argued as follows:

The question in this case whether the board had jurisdiction over petitioner once he began serving his guidelines sentence. Petitioner does not argue that his indeterminate sentence had been discharged once he began serving the guidelines sentence, or dispute that the board would have had authority to impose parole conditions on petitioner once he was released from custody. This is clear from the case law. . . . Rather, petitioner's position is that once he had completed the *prison term* for his indeterminate sentence and begun serving his guidelines sentence, the board temporarily relinquished jurisdiction over him.

At that point, petitioner was in the custody of DOC serving a determinate guidelines sentence. He was not released from confinement onto parole. Thus, he was under the jurisdiction of DOC. Had petitioner been released from custody, the board would have regained jurisdiction over him. At that point, the board could have imposed parole conditions, because petitioner's indeterminate sentence had not been discharged. Thus, because petitioner had completed the prison term for his indeterminate sentence, the board lacked jurisdiction over petitioner until he was released from custody and subject to parole conditions issued by the board.

In light of the factors brought before the Oregon Court of Appeals, its affirmance of the Board's action against Mr. Jenkins was an objectively unreasonable interpretation of the Due Process Clause of the Fourteenth Amendment. *Hicks* and *Whalen* show that a State's arbitrary disregard of state sentencing law violates due process. In *Walker v. Deeds*, discussed *supra*, the Ninth Circuit found that the State court's failure to abide by the State's

own sentencing requirements contravened due process as that protection was interpreted and applied in *Hicks v. Oklahoma*. See *Walker v. Deeds*, 50 F.3d at 673 (discussing *Hicks*).

This Court's decisions in *Kentucky Dept. of Corrections v. Thompson*, 390 U.S. 454 (1989) and *Matthews v. Eldridge* 424, U.S. 219 (1976) similarly stand as controlling interpretations on the protections guaranteed under the Due Process Clause. It is on each of these decisions that Mr. Jenkins relies for his argument in support of the writ. Here, the State court's affirmance unreasonably applied, and was contrary to, those authoritative interpretations. Habeas Corpus relief is thus warranted and available under 28 U.S.C. § 2254(d).

As Jenkins' federal claim had merit, the Ninth Circuit's ruling that it deserved no encouragement to proceed further conflicts with the statutory standard and this Court's amplification of that standard in *Slack*. This Court should accept this certiorari petition in order to further clarify the standard for issuance of a certificate of appealability. The due process guarantee of the Fourteenth Amendment itself, as applied to state prisoners and state parole boards, warrants further amplification from this Court. At a minimum, jurists of reason could debate the constitutional question presented in this case.

**Conclusion**

For the foregoing reasons, the Court should issue a writ of certiorari to review the Ninth Circuit's ruling.

DATED this March 18, 2020.

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