NO. 19-8183

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE NOGALES, Petitioner,

vs.

CALIFORNIA, Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO

THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

JOSE NOGALES
CDCR No.: G52536
Centinela State Prison
P.o. Box: 911
Imperial, California 92251

PETITIONER PROCEEDING PRO SE

QUESTIONS PRESENTED

The State of California recently passed legislation (Senate Bill No. 1391) that effectively eliminated the practice of prosecuting 14 and 15 year old offenders in adult court, and it made this change retroactive for cases in which the judgments are not yet final. It did not, however, extend that same retroactive effect to cases in which the judgments are finalized, such as Petitioner's case. The questions for this Court are:

(1). Given that the legislation's lack of retroactive effect for finalized cases has the result of granting a group of individuals (the 14 year old offenders whom are affected by the bill) several fundamental rights that it denies other similarly situated persons (the 14 year old offenders who committed the same offenses, or intrinsically the same quality of offenses, but who are not affected by the bill), does this legislative amendment violate the Equal Protection Clause of the Fourteenth Amendment?

(2). If so, did the State courts err in denying Petitioner habeas corpus relief on his claim that failing to extend the benefits of the bill to him violates his federal right to equal protection of the law? If the State courts did err, would the appropriate remedy be to declare the statute a nullity, or to extend the benefits to Petitioner?

LIST OF PARTIES

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

RELATED CASES

There are no related cases.

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INTRODUCTION

My name is Jose Nogales. I'm a California State prisoner and I've been incarcerated 13 years. I was arrested and tried as an adult when I was 14 years old. I was sentenced to 80 years to life in State prison.

From my analysis of the United States Constitution and this Court's precedents interpreting the Constitution, I am certain that California's recent legislative amendment, Senate Bill No. 1391 ("SB no. 1391"), violates my right (and the countless other people in my position) to equal protection of the law, as guaranteed by the Fourteenth Amendment's Equal Protection Clause. (See City of Cleburne v. Cleburne Living Ctr. (1985) 473 U.S. 432, 439; Plyler v. Doe (1982) 457 U.S. 202, 216 ["The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated be treated alike"].)

For 24 years, since the enactment of Assembly Bill No. 560 in 1994, the State of California engaged in the practice of charging 14 and 15 year old offenders as adults. It sent hundreds if not thousands of these offenders to State prisons with sentences that exceed even a quarter century. SB no. 1391 amended the statute that permitted such a practice, returning exclusive jurisdiction over this class of offenders to the juvenile court, where they can only be ordered confined in a juvenile institution until the age of 24 years old, and where they'll be given the benefit of the option to eventually

expunge their record of the juvenile adjudication. The State extended retroactive effect of this amendment to non-finalized judgments but did not extend a single form of relief to finalized cases, such as mine. It is this underinclusive nature that renders the statutory amendment unconstitutional.

This is clear because, by only extending retroactive effect to non-finalized judgments, without any regard for finalized cases, the State indiscriminately created a classification in which one group of individuals is being stripped of several fundamental rights that other similarly situated persons are going to be granted or restored through either prospective or retroactive application of the amended statute. Those fundamental rights, although not plainly written on the text of the amended statute, are rights that the excluded group will be deprived of because of the life-long impediments of a criminal conviction which are not applicable to a juvenile adjudication.

To be exact, beginning with the most obvious and perhaps the most significant, the individuals who are affected by the change are granted or restored the right to be free from imprisonment at the young age of 24 years old while the excluded group is forced to remain in the adult system where they may very well have to spend the remainder of their life in State prison. In my case, I'll go before a parole board after 25 years of incarceration, and this does not mean I'll be released but merely be given the opportunity to attempt and demonstrate I meet the standard to be released. It is well established that freedom from imprisonment is a fundamental liberty interest

protected by the federal Constitution. (See Zadvydas v. Davis (2001) 533 U.S. 678, 690 (detention of resident alien that had been ordered removed beyond 90-day removal period implicated liberty interest); Foucha v. Louisiana (1992) 504 U.S. 71, 80 (continued confinement of insanity acquitee after hospital review committee had reported no evidence of mental illness and recommended discharge implicated liberty interest); Youngberg v. Romeo (1982) 457 U.S. 307 (involuntary confinement of mentally retarded individual implicated liberty interest)).

Furthermore, even if the offenders in the excluded group eventually achieve release, a felony criminal conviction (as opposed to a juvenile adjudication) also includes disenfranchisement of the free exercise of rights considered fundamental. For example, the existence of a criminal conviction still may impede the right to vote, disqualify a person from government benefits for housing, employment and even training. (See Reynolds v. Sims (1964) 377 U.S. 533, 561-562 ["Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society... and is preservative of other basic civil and political rights"].)

Another crippling result of a criminal conviction is that, when released from prison, one must deal with the life-long stigmatizing impact of criminality. (See Utah v. Strieff (2016) _U.S._, [136 S.Ct. 2056, 2070] (Sotomayor J., dissenting) ["Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death'

of discrimination by employers, landlords and whoever else conducts a background check"].) A juvenile adjudication does not carry such a result, as one may expunge their record of the juvenile adjudication.

This Court has repeatedly held that no presumption of constitutionality can apply to a discriminatory classification that impinges on fundamental interest. Such classifications are subject to strict scrutiny and are approached with an "attitude of active and critical analysis." (Shapiro v. Thompson (1969) 394 U.S. 618, 638). Under strict scrutiny, a State bears the burden of establishing not only that it has a compelling State interest which justifies the classification but that the distinctions drawn by the classification are necessary to further its purpose. (See Hall v. Beals (1969) 396 U.S. 45, 52 (Justice Marshall, dissenting) ["...once a State has determined that a decision is to be made by a popular vote, it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose"].) The discriminatory classification created by SB no. 1391 fails to survive such scrutiny.

Certiorari should be granted because the California courts failed to give the issue due consideration, and their perfunctory reviews so clearly run afoul of this Court's holdings. Herein, I will outline which holdings the California courts failed to adhere to.

Moreover, this Court's review is necessary because, although this Court has several instructive holdings, it appears that this Court has never

considered or resolved an equal protection issue arising out of the lack of retroactive effect of an ameliorative statute, which means there does not exist a Supreme Court holding to enable lower federal courts to consider the issue, and/or grant relief on the issue, under 28 U.S.C. § 2254, leaving this Court as the only viable veichle for federal constitutional review. (See e.g., Fryman v. Duncan, 2008 U.S. Dist. LEXIS 111064 (ND Cal. July 16, 2008)).

Lastly, certiorari should be granted because the matters involved are of national importance and deserving of this Court's attention. Considering all this Court has had to say about juvenile offenders in the last decade or so, it is truly only this high Court who could resolve the question whether the Constitution permits our states to continue developing their juvenile offender laws without any regard for the individuals whom were affected by the unrefined former policies. Without this Court's guidance, California's legislative change may have a ripple effect throughout our nation, permitting the remaining States to take similar action and sweep the past juvenile offenders under the rug as if the Constitution does not accord individuals like my self any protections.

OPINIONS BELOW

The order of the California Court of Appeal, Fourth District, Division One, summarily denying the petition for writ of habeas corpus appears at Appendix A to this petition and is unpublished.

The order of the California Supreme Court denying discretionary review of the appellate court's decision appears at Appendix B to this petition and is unpublished.

JURISDICTION

The judgment of the California Supreme Court was entered on November 13, 2019. A copy of that decision appears at Appendix B. An extension of time to file this petition for writ of certiorari was granted by Justice Kagan to and including April 11, 2020, on February 18, 2020, in Application No. 19A911.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and 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

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 16, 2008, a jury found me guilty of two counts of second degree murder (Cal. Pen. Code § 187(a)) and one count of shooting at an inhabited residence (Cal. Pen. Code § 246) in the California Superior Court, County of San Diego, Central Division. With respect to each count, the jury found that the offense was committed for the benefit, at the direction of, or in association with, a criminal street gang (Cal Pen. Code § 186.22 (b)), and also found that a principal used a firearm causing the death of another person within the meaning of Cal. Pen. Code § 12022.53 (d) and (e)(1). After the jury returned its verdict, the trial court found me guilty of two counts of unlawful possession of a firearm (Cal. Pen. Code § 12022. 53 (e)) and found true gang enhancement allegations associated with each count. The trial court sentenced me to 80 years to life in State prison. I was tried as an adult pursuant to California's former Welfare and Institutions Code § 707. (Case No. SCD208418).

On direct appeal, the Court of Appeal, Fourth District, Division One, rejected my claim that the evidence was insufficient to support the jury's findings. (Case No. D054174). The California Supreme Court denied discretionary review of that decision on November 10, 2010. (Case No. S185451).

In 2018, the State of California passed legislation, Senate Bill No. 1391, amending its Welfare and Institutions Code § 707. This change returned exclusive jurisdiction over 14 and 15 year old offenders to the juvenile courts, effectively eliminating the practice of prosecuting 14 and 15 year old offenders as adults.

On August 23, 2019, I filed a petition for writ of habeas corpus with the California Court of Appeal, Fourth District, Division One. I argued in pertinent part: (1) the changes of Senate Bill No. 1391 must be retroactively applied to all past cases as a matter of statutory construction; (2) to the extent the Legislature intended to withhold the benefits of Senate Bill No. 1391 from cases in which the judgment is finalized that discrimination is arbitrary and violates his right to equal protection of the law under the federal constitution; (3) my sentence of 80 years to life must be vacated because it constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution, and California Penal Code § 3051 does not moot this challenge.

The appellate court denied this petition in an unpublished order on September 6, 2019. (Case No. D076370 (Appendix A)). The California Supreme Court denied discretionary review of that decision on November 13, 2019. (Case No. S258260 (Appendix B)).

This petition follows.

REASONS FOR GRANTING THE PETITION

1. The State Courts Decided an Important Federal Question in a Way that Conflicts With Relevant Decisions of this Court.

The State courts engaged in very little analysis, if any, of the equal protection challenge to the changes of SB no. 1391. The denials appear to be based on the belief that the challenge was foreclosed pursuant to several State court precedents. (See Appendix A). Not a single one of those holdings, however, involved a systemic change that impinged on fundamental rights. Those holdings concerned legislative action that reduced punishment (merely a few years) for a single statutory offense, none of such nature to raise real equal protection concerns. To put it simply, given the vast difference in context, those holdings could not have been instructive.

That said, the State courts adjudication and decision on the issue is at odds with several decisions of this Court. Indeed, there are several holdings of this Court which indicate this issue should have been handled and resolved differently. The State courts, however, ignored these holdings.

The only holding of this Court that was cited by the State appellate court was Sperry & Hutchinson Co. v. Rhodes (1911) 220 U.S. 502, but its reliance on this holding was misplaced. To begin with, in Sperry & Hutchinson Co. v. Rhodes, this Court did not exactly have occasion to address the constitutional questions presented in this case. There, Justice Holmes merely addressed a

"comment" that was made during "argument," and without explanation loosely stated the "Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." (220 U.S. at 505). This statement, alone, could not possibly control the outcome of the issues here. Moreover, in any event, that case was decided long before the fundamental interest analysis and the strict scrutiny standard became fully delineated tools for use in constitutional evaluation. The first mention of such heightened scrutiny appears to have been made in 1938, in United States v. Carolene Products Company, 304 U.S. 114, (at footnote 4), and appears to not have been employed until some time in 1942. These factors by themselves render Sperry & Hutchinson Co. v. Rhodes inapplicable to this case. The factual difference is too significant and the considerable metamorphosis that has taken place with the standards of constitutional analysis requires that this case be examined through different lens.

A holding of this Court that should have been considered is Skinner v. Oklahoma ex rel. (1942) 316 U.S. 537. There, this Court struck down a law for violating the Equal Protection Clause, holding: "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and serilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." (at 541). Although this case does not involve

sterilization, the Skinner logic applies with equal if not greater force to the discrimination at issue here. This is because, like Skinner, this case involves individuals (14 year old offenders) who have received significantly harsher punishments than other individuals (other 14 year old offenders) who committed intrinsically the same quality of offenses; and, arguably, although the interest at stake here are not exactly race related they are just as great if not greater than those in Skinner, as the aggrieved class has essentially (by virtue of having a life sentence) been stripped of every right ever accorded to free men.

Of course, Skinner did not involve the retroactive application of a statute, but that is without relevance because Skinner, at least in pertinent part, stands for the rule that individuals who commit the same offenses, or intrinsically the same quality of offense, are similarly situated for purposes of equal protection and are thus entitled to equal treatment by criminal laws. In short, Skinner is relevant to this case in that, at the very least, it establishes that the class excluded from the benefits of SB no. 1391 is similarly situated to those actually affected by it and for that reason the state must legally justify the discrimination.

The State courts didn't even go as far as inquiring into whether the two groups are similarly situated so as to spark equal protection concerns. Federal law states they are.

Other holdings of this Court that should have been considered but

were not are those which tell us that the excluded class is effectively going to be denied rights that are considered fundamental. Above, pages 2-4, I've outlined several holdings of this Court relating to fundamental rights. (Zadvydas v. Davis, supra, 533 U.S. 678 (liberty interest); Foucha v. Louisiana, supra, 504 U.S. 71 (liberty interest); Youngberg v. Romeo, supra, 457 U.S. 307 (liberty interest); Reynolds v. Sims, supra, 377 U.S. 533 (right of suffrage)).

It is not without significance that the State courts failed to identify and consider the fundamental interest at play, because in doing so it also side-stepped its obligation to examine the classification through the lens of strict scrutiny. Historically, this Court has stressed the importance of applying strict scrutiny to such classifications, emphasizing its protective nature. (See, e.g., Skinner v. Oklahoma, supra, 316 U.S. at 541: "There is no redemption for the individual whom the law touches. Any experiment which the state conducts is to his irreperable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of police power of the states. We advert to them merely in emphasis of our view that strict scrutiny of the classification... is essential"). Given the interest involved in this case, that absolute necessity for such scutiny was and is applicable here.

When it's all said and done, after applying the proper legal standards set out by this Court's precedents, this discriminatory classification so

clearly cannot survive under the Equal Protection Clause. The State of California cannot provide a compelling or even a legitimate interest for excluding individuals from the benefits of SB no. 1391, especially because in enacting the bill the State Legislature's themselves expressed unequivocal repudiation and regret for the former policy, acknowledging the flaws in it and those who fell victim to it. (See the Ass. Com. Public Saf. Rep. on Sen. Bill No. 1391 (2017-2018 Reg. Sess.) June 26, 2018, [Comment, ¶ 2, Author's Statement, Need for this Bill].) It went as far as recognizing the hard historical fact that the former "practice disproportionately affected black and latino youth." (Id. at p. 4 ["Just over the past 10 years, 50 percent of Latino youth and 60 percent of Black youth were sent to adult court after a transfer hearing, compared to only 10 percent of white youth for similar crimes"].) This conflic with this Court's precedents, and the magnitude of the issues involved, warrants Certiorari. (See Supreme Court Rule 10.(c)).

2. Absent This Court's Review, this Constitutional Violation Will go Unredressed, as This Court is the Only Viable Veichle for Federal Constitutional Review of the State Courts Decisions.

The State courts were completely unwilling to step away from their prior holdings that do not come close to providing an adequate formula for resolving this particular issue. I fear that, absent this Court's review, this Constitutional violation will go unredressed.

For example, in Fryman v. Duncan, supra, 2008 U.S. Dist. LEXIS

111064, a habeas proceeding under 28 U.S.C. § 2254, a district court considered a somewhat similar issue and ultimately reasoned that, while it agrees with the petitioner's claim that it is well established federal law that as a general proposition strict scrutiny must be applied to a classification impinging on fundamental interest, it cannot say the State courts unreasonably applied "clearly established federal precedent" in not doing so, as the U.S. Supreme Court has yet to recognize an equal protection violation arising out of the lack of retroactive effect of a new ameliorating statute. (Pages 9-10 of the order, citing Yarborough v. Alvarado (2004) 541 U.S. 652, 666).

The magnitude of the interest at stake in this case are far greater than those in Fryman, and the issues in this case are actually of national importance. However, if this Court denies certiorari, it is likely this same result will be reached in a habeas proceeding before a district court. Absent this Court's review, it may very well be futile to seek such review from a district court.

Having said that, given that there is no other remedial veichle from which this constitutional violation may be corrected, this Court's review is essential.

3. The Issues Involved are of National Importance and Deserving of this Court's Attention.

As science and psychology continue to revolutionize society's understanding of youth, States have been and will almost certainly continue

to change the manner they try youth offenders within their jurisdictions. The constitutional question whether the Equal Protection Clause entitled past youth offenders who were affected by a former unrefined policy to some form of relief is of national importance and requires some guidance from this high Court.

This isn't simply a matter of legal principles, but also of basic human decency.

From a legal standpoint, it's hard to imagine that, whatever the State's justification may be, the Equal Protection Clause of the Fourteenth Amendment would permit such a, to put it frankly, ridiculous disparity in treatment. These individuals with finalized judgments are very well alive and suffering from adult sentences they were given for crimes that occurred when they were 14 and 15 years old, they have not died and become a part of history such that it enables society to forget they're there. To continue depriving them of so much liberties, when others that are the same in all relevant respects are free from such punishment, violates practically every notion of fairness and equality this country has every stood for.

From a perspective of human decency, this discrimination also seems to strike a blow at the very progress of our civilization. As an ever-developing society, we'll likely always have a past in which we've made decisions that we later believe to have been wrong. As history proves, we aren't always given the opportunity to correct them, but if and when we are given such an opportunity

should we not, at least in some instances, correct those decisions? Here, where scientific and psychological advances has led a State government to conclude that punishing a certain class of offenders as adults was far too harsh, should decency not dictate that the individuals whom the State has and continues to subject to such punishment be provided with some form of relief?

This Court's precedents (to wit, Miller v. Alabama (2012) 567 U.S. 460) are at the heart of this wave of legislative changes to juvenile offender laws within this nation's States. As such, as a citizen of these United States, and as a walking example of how a juvenile offender can grow into a law abiding citizen while incarcerated, I believe it is also for this Court to guide us on the issue that is addressed above. Absent such guidance, other States may be emboldened to pass similar unconstitutional legislation.

CONCLUSION

Another question that remains is whether the changes of the bill should be nullified or must California extend the benefits to the excluded class? (See Califano v. Westcott (1979) 443 U.S. 76, 89 ["Where a statute is defective because of underinclusion... 'there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion'"].) I believe this is a matter the state courts could resolve on remand.

I respectfully ask that my pleadings, above, be liberally construed. (See Erickson v. Pardus (2007) 551 U.S. 89, 94). I thank the Court for its time and consideration, and I ask it to stand by its consistent and historical interpretation of the Constitution: "the liberties of none are safe unless the liberties of all are protected." — Justice William O. Douglas.

I hereby declare the foregoing is true and correct, executed this 19th day of March, 2020.

Date: 03/19/2020

Respectfully,

Petitioner Jose Nogales,
pro se.