20-6825

No. _____

ORIGINAL

Supreme Court, U.S.
FILED
DEC 18 2020
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW S. ANDERSEN — PETITIONER
(Your Name)

vs.

MARSELA MONTES, ET AL., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NINTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANDREW ANDERSEN
(Your Name)

Valley State Prison
P.O. BOX 96
(Address)

Chowchilla, CA 93610
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Did this Court's ruling in Swarthout v. Cooke and Greenholtz v. Inmates of Nebraska foreclose First Amendment challenges agasint statements of reasons that contain a reason for denying the benefit of parole when a reason for denial is based on the exercise of protected First Amendment freedoms and there was an opportunity to be heard?

2. Did this Court's ruling in Swarthout and Greenholtz foreclose facial challenges of the California parole suitability determination regulatory scheme under the First Amendment?

3. Did prisoners lose their First Amendment right to challenge parole denial decisions that are based on the exercise of protected First Amendment freedoms?

4. Did prisoners lose their First Amendment right to challenge parole suitability determination schemes on thier face under the First Amendment

5. Are prisoners allowed to challenge parole suitability determination schemes using the Turner v. Safley test under the First Amendment?

LIST OF PARTIES

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

[x] 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:

Marsela Montes

Tamiza Hockenhull

Jennifer Shaffer

RELATED CASES

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF CASES CITED

CASES

STATUTES AND RULES

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

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] 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

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was ~~May 14, 2020~~.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ~~August 28, 2020~~, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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

This case involes Amendment I of the United States Constitution:

> Congress shall make no law ... abridging freedom of speech...

The Amendment is enforced by Title 42, Section 1983, United States Code:

> Every person who, under the color of any statute, ordinance, regulation, custom or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdication thereof to the deprivation of sny rights, privileges, or immunites 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The regulations at issue are California Code of Regulations, Title 15, Division 2, Sections 2281 and 2255 the full text is located in Appendix E, pp. 4-6.

STATEMENT OF THE CASE

The petitioner's complaint alleged an as-applied and facial challenge of California Code of Regulations, Title 15, §§ 2255 and 2281 under the First Amendment. The as-applied challenge was dismissed at the 28 U.S.C. § 1915A stage without leave to amend on the ground that this Court's ruling in Swarthout v. Cooke, 562 U.S. 216 citing Greenholtz v. Inmates of Nebraska Penal and Corr. Complex, 442 U.S. 1 (1979) foreclosed any constitutional challenge of a reason for denial of parole in a statement of reasons so long as there is was an opportunity to be heard and a statement of reasons issued. The lower court citing this Court stating: "The Constitution ... does not require more." (Id. at p. 220.)

Petitioner also asserted a facial challenge under the First Amendment claiming that the regulatory scheme of the California Board of Parole Hearings ("BPH") for determining whether to grant life prisoners release on parole violates the First Amendment. Petitioner argued that the BPH delegates overly board discretion to government officials in making content-of-speech based decisions. Petitioner also alleged that the BPH lacks sufficient procedures and safeguards to timely challenge a content-based decision for being overbroad, vague, capricious, arbitrary, biased or any other type of First Amendment challenge.

The facial challenge was screened out at the 28 U.S.C. § 1915A stage without being allowed to develop the record for the following reasons: 1) "the Supreme Court has 'maintained that the constitutional rights that prisoners possess are more limted in scope than the constitutional rights held by individuals in society at large'" (Appendix D, p. 2); 2) the regulations at issue are not overly broad, as they set forth standards and objective factors that the BPH is to consider when determining whether an inmate is suitable for release on parole; and 3) 28 U.S.C. § 2254 is available to file habeas corpus petitions.

The court of appeals upheld both the as-applied and facial challange dismissals.

This case hinges on whether this Court by ruling that "[t]he Constitution does not require more" forecloses as-applied challenges against parole decisions that deny the benefit of parole because the life prisoner exercised his First Amendment freedoms and thus penalizing that right and whether prisoners can challenge parole regulations under the First Amendment as overbroad and vague. Per the lower courts, when as-applied challenges are foreclosed for First Amendment challenges then it is futile to challenge the regulatory scheme facially under the First Amendment.

REASONS FOR GRANTING THE WRIT

A. Conflicts with Decisions of this Court

The holding of the courts below that a facial challenge of California's parole suitability determination scheme (hereafter called "the scheme") is not cognizable under the First Amendment conflicts with holdings of this Court. In Sandin v. Conner, 515 U.S. 472, 481 n.11 (1995) this Court held that even when a prisoner cannot bring a challenge under due process, one can be brought under the First Amendment. This Court also created Turner v. Safley, 482 U.S. 78 (1987) for prisoners to bring First Amendment challenges against prison regulations and allow prisoners to "marshal substantial evidence" to prove their case in Beard v. Banks, 548 U.S. 521, 535 (2006). This Court has allowed challenges under the First Amendment for situations where a privilege was denied because a prisoner exercised a protected first Amendment right in Crawford-EL v. Britton, 523 U.S. 574, 588 fn 10 (discussing retaliation as akin to "unconstitutional conditions"). This Court has held that "Inmates clearly retain protections afforded by the First Amendment." (O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).)

B. Importance of the Questions Presented

This case presents fundamental questions of the interpretation of Greenholtz and Swarthout as it applies to the denial of the benefit of parole because a prisoner exercised a protected First Amendment right. The questions presented are of great public importance because if the lower courts' ruling is correct, prisoners in every state would be foreclosed from challenging a parole denial decision under the "unconstitutional conditions doctrine" where the benefit of parole was conditioned on waiving protected First Amendment freedoms. or the benefit was denied because of the exercise of First Amendment freedoms. such as giving up the right to file grievances and law suits or because of the filing of grievances or lawsuits. Based on the lower courts' ruling, such

conditions and penalities cannot be reviewed by a federal court if the prisoner received all the process his was due because this Court took that right away in Swarthout and Greenholtz.

The lower courts are misinterpreting Swarthout and Greenholtz. Swarthout was based on Greenholtz and the issue before Greenholtz was how much process was due for receiving parole when there is no federal right to parole but a state-created liberty interest. In the instant case the issue is the loss of a protected federal right to freedom of expression to earn parole. This Court has held that:

> even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech. Rutan v. Republican Party of Ill., 497 U.S. 62, 72 (1990).

When this Court held that "a prisoner subject to a parole statute ... receive[s] adequate process when he [i]s allowed an opportunity to be heard and [i]s provided a statement of reasons why parole was denied. The Constitution ... does not require more" (Swarthout, supra, at p. 220 (internal quotation marks and citations omitted)), this Court was not foreclosing a First Amendment challenge against a reason for denial of parole when that reason infringes on protected First Amendment freedoms. This Court has held that "if the government could deny a benefit to a person because of his constitutionally protected speech ..., his expression of those freedoms would in effect be penalized and inhibited." (Perry v. Sindermann, 408 U.S. 592, 597 (1972).) When a parole board makes such a denial of parole, per the lower courts prisoners have no remedy at law and must inhibit that speech before and at a future board hearing to earn release. This Court made no such restriction. It is not conceivable that this Court would make such a wide sweeping ruling beyond the issues and questions before it.

These questions are also important because the lower courts' holding prevents Turner v. Safley challenges against parole regulations or parole suitability

determination regulatory schemes by prisoners. Prisoners should be allowed to challenge such regulatory schemes facially under the First Amendment and have an opportunity to develop a record to demonstrate that the scheme is overboard pursuant to Virgina v. Hicks, 539 U.S. 113, 122 (2003); United States v. Stevens, 559 U.S. 460, 472 (2010); and Houston v. Hill, 482 U.S. 451, 458 (1987).

Thus the court below seriously misinterpreted Swarthout and Greenholtz by holding that those cases foreclosed as-applied and facial challenges under the First Amendment of parole decisions and parole regulatory schemes where the right at issue are First Amendment rights. The Court should correct that misinterpretation and make it clear that its holding in Swarthout and Greenholtz did not foreclose such challenges.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

November 24, 2010

Respectfully submitted,

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APPENDIX A