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20-7149

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL JOHN GADDY — PETITIONER
(Your Name)

vs.

C.E. DUCART, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

IN THE UNITED STATES COURT OF APPEALS, 9th CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL JOHN GADDY
(Your Name)

P.O. BOX 5106
(Address)

DELANO, CALIFORNIA 93216
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

WHETHER CONSTITUTIONAL SAFEGUARDS SET FORTH IN GREENHOLTZ V. INMATES OF NEBRASKA PENAL CORRECTIONAL COMPLEX, 442 U.S. 1 (1979) WERE SATISFIED WHEN PRISON OFFICIALS ARBITRARILY DEPRIVED PETITIONER THE OPPORTUNITY TO BE HEARD AT AN ELIGIBLE PAROLE HEARING?

WHETHER PETITIONER WAS AFFORDED MINIMAL PROCEDURAL DUE PROCESS PROTECTIONS AS SET FORTH IN GREENHOLTZ V. INMATES OF NEBRASKA PENAL CORRECTIONAL COMPLEX, 442 U.S. 1 (1979) WHEN PRISON OFFICIALS DEPRIVED HIM OF A PAROLE SUITABILITY HEARING?

WHETHER PETITIONER HAD A LIBERTY INTEREST PROTECTED BY THE 14TH AMENDMENT IN AN ELIGIBLE PAROLE HEARING AS SET FORTH IN PAROLE STATUTE PENAL CODE SECTION 3041?

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:

DEFENDANTS - APPELLEES

C. E. DUCART, ASSOCIATE WARDEN
DEFENDANT,

D. BRADBURY, WARDEN
DEFENDANT,

P. BADURA, CORRECTIONAL CASE RECORDS SUPERVISOR
DEFENDANT,

G. JONES, ASSOCIATE WARDEN
DEFENDANT,

J. PETERSON, ASSOCIATE WARDEN
DEFENDANT,

D. BAUGHMAN, WARDEN,
DEFENDANT,

D. HOTTINGER, CORRECTIONAL CASE RECORDS MANAGER
DEFENDANT,

C. KEARNS, CORRECTIONAL CASE RECORDS SUPERVISOR
DEFENDANT,

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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☒ is unpublished.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 B to the petition and is

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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was APRIL 21, 2020.

☐ 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: AUGUST 20, 2020, and a copy of the order denying rehearing appears at Appendix C.

☐ 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 involves Amendment XIV to the United States Constitution, which provides:

Section 1. 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 privilege 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 law.

Statutes:

California Penal Code § 3041, which provides:

In the case of any inmate sentenced pursuant to any law, other than Chapter 4.5. (Commencing with Section 1170) of title 7 of part 2, The Board of Parole Hearings shall meet with each inmate during the sixth year before the inmate's Minimum Eligible Parole Date for the purposes of reviewing and documenting the inmate's activities and conduct pertinent to parole eligibility. During this Consultation, The Board shall provide the inmate with information about the parole hearing process, legal factors, relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs and institutional behavior. Within 30 days following the Consultation, the Board shall issue its positive and negative findings and recommendations to the inmate in writing.

(2) One year before the inmate's Minimum Eligible Parole Date a panel of two or more Commissioners or deputy Commissioners shall normally grant parole as provided in Section 3041.5.(1) However, an inmate shall not be released before reaching his or her Minimum Eligible Parole Date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her Youth offender parole Eligible Date or Elderly Parole Eligible date.

California Penal Code § 3046, which provides:

An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following:

(1) A term of at least seven calendar years, and (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.

California Penal Code § 1170.1, which provides:

As is relevant here subdivision (c) provides - That when a prisoner is sentenced to a consecutive term for a felony committed in

Continue...

State prison. The term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. For prisoners serving indeterminate terms, the consecutive sentence for in prison offenses begins on the date the prisoner is found suitable for parole, not the date he or she completes his base term.

Section 5 Under the XIV Amendment provides that, The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

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

Every person who, under 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 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. 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.

STATEMENT OF THE CASE

Petitioner filed a Civil Complaint in the District Court against prison officials alleging that he had been Constitutionally deprived of the right to a 2016 parole hearing for which he was eligible for and entitled to. It was further alleged that prison officials denied him procedural due process when they arbitrarily abrogated the eligible parole hearing date from 2016 to 2048 without a hearing or notification.

Stemming from a Los Angeles Superior Court in case No. BA075584, Petitioner is serving an indeterminate life sentence with the possibility of parole pursuant to California Penal Code Section 3046 following his 1993 Conviction for Attempted murder, he was also convicted of 2nd degree robbery and attempted robbery. Petitioner's total term from the 1993 conviction was life with the possibility of parole plus 11 years and 8 months. Petitioner's date for a parole eligibility hearing was calculated by prison officials to be 2011. Because petitioner was sentenced pursuant to California Penal Code Section 3046, which mandates that after seven calendar years have been served for the life term petitioner would be eligible for parole.

In 1994 petitioner was sentenced in San Bernadino Superior Court in case no. FCH01069 to a determinate term of six years. This determinate term was ordered to run consecutive to case no. BA075584. However, because P.C. § 3046 allows that any other law that establishes a minimum term to be served while serving the life with the possibility of parole sentence - the six year term was ran with the determinate term of 11 years and 8 months. Prison officials calculated Petitioner's date for a hearing for parole eligibility August 2016 for case no. BA075583 - The 1993 conviction.

In 2007, petitioner was sentenced in Kings County Superior Court in case no. 06CM7259 to a 3 strikes term resulting in the indeterminate sentence of 32 years to life to be ran consecutive to case no. BA075584. Penal Code § 1170.1(c) is applicable in petitioner's case running consecutive to case no. BA075584.

Without a hearing for parole eligibility and suitability prison officials arbitrarily abrogated petitioner's eligibility parole hearing from 2016 to 2048. The hearing for petitioner's 1993 case no. BA075584 was never held. § 1170.1 is clear and stipulates how the consecutive term shall ran. Petitioner has not had a parole hearing of any kind in 27 years for case no. BA075584. When 1170.1(c)

clearly provides that... for prisoners serving indeterminate terms, the Consecutive Sentence for in prison offenses begins on the date the prisoner is found suitable for parole, not the date he or she completes his base term.

Petitioner is being deprived of a parole hearing to find suitability, what is expected to obtain suitability or why he was found unsuitable. Prison officials are proposing that petitioner will have to spend 58 years in prison before he is to learn what makes him suitable for parole under the 1993 conviction after serving close to six decades and more than a half of a century. Prison officials violated Petitioner's right to due process of law the right to be heard.

The District Court dismissed the Action in favor of Defendants on the grounds that petitioner does not have a liberty interest arising out of California Penal Code § 3041, section 3041 is not applicable to petitioner's case and Prison officials properly aggregated petitioner's terms, including his 2007 sentence and correctly calculated his MEPD to be 2046. The Court ruled that Petitioner is not yet entitled to a parole hearing and Defendants' failure to schedule a parole hearing does not violate section 3041, and because Prison officials did not err in calculating petitioner's MEPD, the failure to schedule a parole hearing did not violate either the Due Process Clause or the Eight Amendment. The Court of appeals affirmed the ruling never addressing Petitioner's assertion of prison officials violating the Due Process clause in depriving petitioner of the right to be heard in a parole hearing instead the Court of appeal ruled that petitioner did not prove that Defendants miscalculated petitioner's eligibility parole date although only the parole Board can calculate and issue an parole date, petitioner never even made claim about an actual parole date. The claim has always been about a parole eligibility hearing. The right to be heard and whether petitioner has received adequate due process of the reasons why the parole hearing was denied for case no. BA075584. An Inmate becomes eligible for parole when the minimum term has been served pursuant to § 3041 and under case no. BA075584 petitioner has served the minimum term for the 1993 conviction. This is not a case about a parole date. It's about a parole hearing.

REASONS FOR GRANTING THE PETITION

IN the California Context, In *Swarthout v. Cooke*, 562 U.S. 216 (2011), the United States Supreme Court applied the procedural protections set forth in *Greenholtz* to determine whether the petitioner had received adequate due process in the context of a parole suitability hearing. The court held that where the liberty interest at stake was the interest in receiving parole when the California standards for parole had been met, "the minimum procedures adequate for due-process protection of that interest are those set forth in *Greenholtz*." *Greenholtz* limits those procedures to a meaningful opportunity to be heard and a statement of the reasons why parole was denied. In the instant case, petitioner is challenging prison official's arbitrary actions of depriving him of an eligible parole hearing and the minimal procedures for a parole suitability hearing as set forth in *Greenholtz*. Specifically, he contends that this Court should apply the procedural due process requirements set forth in *Greenholtz v. Inmates of Nebraska Penal Correctional Complex*, 442 U.S. 1 (1979).

IN *Greenholtz*, the District Court held that the procedures used by the Parole Board did not satisfy due process. It concluded that the inmate had the same kind of constitutionally protected "conditional liberty" interest, recognized by this Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), held that some of the procedures used by the parole board fell short of constitutional guarantees, and prescribed several specific requirements.

On appeal, the Court of Appeals for the Eight Circuit agreed with the District Court that the inmate had a *Morrissey*-type, conditional liberty interest at stake and also found a statutorily defined, protectible interest in Neb. Rev. Stat. § 83-1, 114 (1976). The Court of Appeals, however, 576 F.2d 1274, 1285, modified the procedures required by the District Court as follows:

(a) When eligible for parole each inmate must receive a full formal hearing;

(b) the inmate is to receive written notice of the precise time of the hearing reasonably in advance of the hearing, setting forth the factors which may be considered by the Board in reaching its decision;

(c) Subject only to security considerations, the inmate may appear in person before the Board and present documentary evidence in his own behalf. Except in unusual circumstances, however, the inmate has no right to call witnesses in his own behalf;

(d) a record of the proceedings, capable of being reduced to writing, must be maintained; and

(e) within a reasonable time after the hearing, the Board must submit a full explanation, in writing, of the facts relied upon and reasons for the Board's action denying parole.

A. Conflicts with decisions of other Courts

The Court's holding mandating the foregoing procedures for parole determinations conflicts with decisions of other courts of Appeals. See, e.g. *Brown v. Lundgren*, 528 F.2d 1050 (CA5), cert. denied, 429 U.S. 917 (1976); *Scarpa v. United States Board of Parole*, 477 F.2d 278 (CA5) (en banc), vacated as moot, 414 U.S. 809 (1973); *Scott v. Kentucky Parole Board*, No. 74-1899 (CA6 Jan. 15, 1975), vacated and remanded to consider mootness, 429 U.S. 60 (1976). See also *Franklin v. Shields*, 569 F.2d 784, 800 (CA4 1977), cert. denied, 435 U.S. 1003 (1978); *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (CA7 1975), cert. denied, 425 U.S. 914 (1976). This Court granted certiorari to resolve the circuit conflicts. 439 U.S. 817.

B. Respondents in *Greenholtz* emphasized that the structure of the provision together with the use of the word "shall" binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found. It was claimed that the statute creates a presumption that parole release will be granted, and that this in turn creates a legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists.

It was then argued that the Nebraska parole determination Provision is similar to the Nebraska statute involved in *Wolff v. McDonnell*, 418 U.S. 539 (1974), that granted good-time credits to inmates. There this Court held that, due process protected the inmates from the arbitrary loss of the statutory right to credits because they were provided subject only to good behavior. This Court held that the statute created a liberty interest protected by due process guarantees. The Board argued in response that a presumption would be created only if the statutory conditions for deferral were essentially factual, as in *Wolff* and *Morrissey*, rather than predictive.

This Court stated that since respondents elected to litigate their due process claim in federal court, it was denied the benefit of the Nebraska Court's interpretation of the scope of the interest, if any, the statute was intended to afford to inmates. See *Bishop v. Wood*, 426 U.S. 341, 345 (1976). This Court accepted

respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, this Court emphasized that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis. And therefore turned to an examination of the statutory procedures to determine whether they provide the process that is due in these circumstances.

Petitioner's argument is that California's statutory language itself creates a protectible entitlement to an eligible parole hearing. Because the language in the statute creates a legitimate expectation of parole only after the gateway of a parole hearing has been held. Similar to the Nebraska statute involved in *Wolff v. McDonnell*, 418 U.S. 539 (1974). This Court held there that due process protected the inmates from the arbitrary loss of the statutory right to credits because they were provided subject only to good behavior. The Court held that the statute created a liberty interest protected by due process guarantees.

Petitioner relies on the section 3041 which provides...

In the case of any inmate sentenced pursuant to any law other than chapter 4.5. (Commencing with section 1170) of title 7 of part 2, The Board of Parole Hearings shall meet with each inmate during the sixth year before the inmate's Minimum Eligible Parole Date for the purposes of reviewing and documenting the inmate's activities and conduct pertinent to parole eligibility. During this Consultation, The Board shall provide the inmate with information about the parole hearing process, legal factors, relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs and institutional behavior. Within 30 days following the Consultation, the Board shall issue its positive and negative findings and recommendations to the inmate in writing.

(2) One year before the inmate's Minimum Eligible Parole date. A panel of two or more commissioners or deputy commissioners shall normally grant parole as provided in section 3041.5. However, an inmate shall not be released before reaching his or her Minimum Eligible Parole Date as set pursuant to section 3046.

The statute is clear and limits prison officials and the Boards discretion by the usage of the mandatory language "shall". Petitioner has been incarcerated for over 27 years under case no. BA075584 and has never been afforded a hearing of any kind in compliance with section 3041. Without the parole hearings set forth in section 3041 how can petitioner meet the possibility of parole that trumps the

mere hope relevant to his suitability. petitioner can not obtain the information about obtaining his liberty anywhere else. And Prison officials has barred and blocked the path arbitrarily. The very actions Greenholtz does not permit. Prison officials did not use any viable procedure in the decision. see Mathews v. Eldridge, 424 U.S., at 345-346; SEC v. Chenery Corp., 318 U.S. 80 (1942). An inability to provide any reasons suggests that the decision is, in fact, arbitrary.

Greenholtz addresses protection by the Due Process clause from arbitrary government action, when it stated in concurring opinion by Mr. Justice Powell, dissenting in part.

"Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action. *Ingraham v. Wright*, 430 U.S. 651, 673-674 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Because this fundamental liberty is valuable and its termination inflicts a 'grievous loss' on the parolee, the Court concluded in *Morrissey* that the decision to revoke parole must be made in conformity with due process standards. 408 U.S., at 482. Similarly in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), we held that a probationer must be accorded due process when a decision is to be made about the continuation of his probation. And the decision to rescind a prisoner's 'good-time credits', which directly determine the time at which he will be eligible for parole, also must be reached, in compliance with due process requirements. *Wolff v. McDonnell*, 418 U.S. 539 (1974)."

"In principle, it seems to me that the Due process clause is no less applicable to the parole-release determination than to the decisions by state agencies at issue in the foregoing cases. Nothing in the Constitution requires a state to provide for probation or parole. But when a state adopts a parole system that applies general standards of eligibility, prisoners justifiably expect that parole will be granted fairly and according to law whenever those standards are met. This is so whether the governing statute states, as here, that parole 'shall' be granted unless certain conditions exist, or provides some other standard for making the parole decision. Contrary to the Court's conclusion, ante, at 9-11, I am convinced that the presence of a parole system is sufficient to create a liberty interest, protected by the Constitution, in the parole-release decision."

Petitioner was sentenced to life with the possibility of parole pursuant to Penal Code 304b, enforceable by Section 304j for case no. BA075584 in 1993. Whether its *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1 (1979), *Morrissey v. Brewer*, 408 U.S. 471 (1972), *Board of Regents*

V. Roth, 408 U.S. 564, 572 (1972), Gagnon v. Scarpelli, 411 U.S. 778 (1973) or Wolff v. McDonnell, 418 U.S. 539 (1974). The Common Sense understanding of protection by the Due Process Clause from arbitrary governmental action is a hearing of some sort depending on the circumstances of these cases and the opportunity to be heard whenever a decision is to be made concerning one's liberty, and nothing in Greenholtz, Board of Regents, Gagnon or Wolff suggests otherwise. Whether that decision is to revoke parole, is about the continuation of probation, the decision to rescind a prisoner's good time credits or the decision to deprive a prisoner, as in petitioner's case, to a parole hearing altogether, petitioner's case is inclusive in all of these cases that share the commonality that a hearing, first and foremost and the opportunity to be heard is the be-all and end-all due process requirement.

Greenholtz is the controlling precedent here and has guided the lower courts by pointing out that, the Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole. This affords the process that is due under these circumstances. The Constitution does not require more. 442 U.S. at 6.

Prompting petitioner to ask this Court, whether the Procedural Safeguards set forth in Greenholtz were satisfied when prison officials arbitrarily deprived petitioner of a parole hearing he was eligible for which is the only place petitioner could acquire information about obtaining his liberty, a parole hearing petitioner is entitled to pursuant section 3041 and 3046 for case no. BA075584.

Although ^{PETITIONER} WAS sentenced to life with the possibility of parole it is not a sentence of life without the possibility of parole and Section 3046 announces the distinction. Section 3046 which provides: "An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following: (1) A term of at least seven calendar years, and (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole."

However, to substantiate the mere possibility of parole beyond a mere hope, petitioner once eligible in terms of serving of years still has to go before a parole board to determine what part he is to partake in making eligibility of parole his liberty a reality. Section 3046 limits prison officials discretion in putting off the consideration of eligibility until whenever they feel like getting around to it.

This is arbitrary actions by government that Greenholtz just does not support and has stated the Constitution safeguards against. Furthermore this Court has held...

... "It is important that we not overlook the ultimate purpose of parole which is a component of the long-range objective of rehabilitation. The fact that anticipations and hopes for rehabilitation programs have fallen far short of expectations of a generation ago need not lead states to abandon hopes for those objectives; states may adopt a balanced approach in making parole determinations, as in all problems of administering the Correctional Systems. The objective of rehabilitating convicted persons to be useful, law-abiding members of society can remain a goal no matter how disappointing the progress. But it will not contribute to these desirable objectives to invite or encourage a continuing state of adversary relations between society and the inmate." 442 U.S. 915.

WHETHER PETITIONER WAS AFFORDED MINIMAL PROCEDURAL DUE PROCESS PROTECTIONS AS SET FORTH IN GREENHOLTZ WHEN C. PRISON OFFICIALS DEPRIVED HIM OF A PAROLE SUITABILITY HEARING?

The Due Process Clause of the Fourteenth Amendment prohibits state action that deprives a person of life, liberty, or property without due process of law. A litigant alleging a due process violation must first demonstrate that he was deprived of a liberty or property interest protected by the due process clause and then show that the procedures attendant upon the deprivation were not constitutionally sufficient. *Kentucky Dept of Corrections v. Thompson*, 490 U.S. 454, 459-60 (1989).

The record reflects in 1993, Under case no. BA075584 Petitioner was sentenced to life with the possibility of Parole pursuant to Section 3046 plus 11 years and 8 months. Prison officials calculated Petitioner's Minimum Eligible Parole Date Schedule for a parole hearing in August 2016.

In 2007, Under case no. 06CM7259, petitioner was convicted for a in-prison charge of Malice and forethought and force likely to cause G.B.I and was sentenced to the indeterminate term of 32 years to life under the 3 Strikes law. The Court ordered that the indeterminate term of 32 years to life is to be served consecutively to petitioners 1993-BA075584 case from Los Angeles County.

Without any parole hearing whatsoever finding petitioner suitable for parole for case no. BA075584 and without any provisional, statutory or legal authority, Prison Officials has done away with affording petitioner with the 2016 Scheduled parole hearing ensuring no suitability can be found for case no. BA075584. In a grievance response the prison officials claimed that because petitioner had received the

the 32 years to life indeterminate sentence in 2007 that he will not be seen by the Parole Board for the first time until 2048.

However, prison officials are not relying upon any law that grants such a degree of discretion to just arbitrarily abrogate the avenue to petitioners liberty. The Parole Board's discretion is even limited at the threshold of the actual hearing. Prison officials are far out of bounds by barring petitioner's path to a parole suitability hearing for case no. BA075584, which has to take place before prison officials can start the 2007 case no. 06cm7259, sentence. But it still does not change the fact that the Board—not prison officials—is vested with exclusive authority to decide whether a life prisoner is suitable for parole (Pen. Code, § 3040; Cal. Code Regs., tit. 15 §§ 2265-2454; *In re Powell* (1981) 45 Cal. 3d 894, 901 248 Cal. Rptr. 431, 755 P.2d 881) (*Powell*)). One year before the Prisoner's Minimum Eligible Release Date, a panel of the Board meets with the inmate and normally sets a parole release date. (Pen. Code § 3041, subd. (a)). There is no procedure that authorizes prison officials to change the calculation of a prisoner's minimum eligible parole date on whim.

The District Court dismissed petitioner's complaint reasoning that petitioner's complaint failed to state a cognizable due process claim or a cognizable Eighth Amendment claim basing the ruling on petitioner's parole eligibility date changed from 2016 to 2048 because petitioner was convicted of an additional crime in 2007 and sentenced to an additional term of 32 years to life to run consecutive to the prior two terms. Petitioner was therefore ineligible for parole on the earlier two sentences because he was required to serve an additional prison term. The court ^{never} distinguishes who determined petitioner to be ineligible for parole for case no. BA075584. The presumption by the District Court is unconvincing. It relied on Section 1170.1(c) in part omitting part of the statute that petitioner includes for the court's review. See Section 1170.1 as is relevant here subdivision (c) provides;

"That when a prisoner is sentenced to a consecutive term for a felony committed in state prison the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. For prisoners serving indeterminate term, the consecutive sentence for in prison offenses begins on the date the prisoner is found suitable for parole, not the date he or she completes his base term."

Petitioner was entitled to a parole suitability hearing, at the very least, for case BA075584. And if found unsuitable, petitioner was to be notified what he can do to become suitable for parole. The statute does not give prison officials the discretion to take actions reserved for the Parole Board, actions that can only take place after the Parole Board has acted.

Greenholtz determination into whether procedural due process has been satisfied begins with the language in the statute. Section 1170.1(c) provides that parole suitability will have to be found prior to the beginning of a consecutive sentence for prisoners serving an indeterminate term. Clearly, for parole suitability to be found, first a parole hearing for parole suitability must be held. Prison official skips the procedure due prior to abrogating petitioner's parole hearing from 2016 to 2048 and therefore deprives petitioner to the only road available to obtain suitability finding without any procedural grounding for doing so.

According to prison officials calculation and discretionary methods in deciding the direction of petitioner's liberty. Petitioner will go before a Parole Board for the first time ☐ after serving 58 years to learn what is expected of him to become eligible for parole. Being prison officials has already usurped the actions of a parole Board by eliminating the parole suitability hearing altogether.

Because the federal right at issue is procedural the relevant question is what due process petitioner received, not whether the lower court decided the case correctly. Greenholtz held adequate process is provided when the inmate is allowed a meaningful opportunity to be heard and a statement of the reasons why parole was denied. Federal due process is satisfied where petitioners were allowed to speak at their parole hearings and to contest the evidence against him, were afforded access to their records in advance, and were notified as to the reasons why parole was denied. Greenholtz, 442 U.S. at 16.

Petitioner was not allowed a meaningful opportunity to be heard and there has been no statement of the reason why petitioner was deprived of a parole hearing - in essence this is tantamount to denying petitioner parole. None of the procedural due process outlined in Greenholtz was afforded to petitioner.

A protected liberty interest may arise from either the Due Process clause of the United States Constitution "by reason of guarantees implicit in the word 'liberty,'" or from an expectation or interest created by state laws or policies," *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citation omitted). See also *Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The United States Constitution does not, of its own force, create a protected liberty interest in a parole date, even one that has been set. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981); *Greenholtz v. Inmates of Neb. Penal*,

442 U.S. 17 (1979) (There is "no Constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."); see also *Hayward v. Marshall*, 603 F.3d 546, 561 (9th Cir. 2010) (en banc). However, "a state's statutory scheme, if it uses mandatory language, 'creates a presumption that parole release will be granted' when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest." *Greenholtz*, 442 U.S. at 12. See also *Allen*, 482 U.S. at 376-78. California's parole scheme gives rise to a liberty interest in parole protected by the federal due process clause. *McQuillion v. Duncan*, 306 F.3d 895, 902-03 (9th Cir. 2002) ("California's parole scheme gives rise to a cognizable liberty interest in release on parole."); see *Cooke*, 131 S.Ct. at 861-62 (stating that the Ninth Circuit's determination that California's parole law creates a liberty interest protected by the federal due process clause "is a reasonable application of our cases").

"This standard does not permit prison officials to exercise their discretion to exclude prisoners from parole hearings they are eligible for and entitled to when there is no procedure used to exclude them. And nothing in *Greenholtz* alters the holding that the opportunity to be heard and a statement of the reasons why parole was denied this applies to the actual hearings for parole as well.

(D) WHETHER PETITIONER HAD A LIBERTY INTEREST PROTECTED BY THE FOURTEENTH AMENDMENT IN AN ELIGIBLE PAROLE HEARING AS SET FORTH IN PAROLE STATUTE P.C. SECTION 3041?

In *Greenholtz* the Respondent's second argument was that the Nebraska statutory language itself creates a protectible expectation of parole. They relied on the section which provides in part:

"Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

"(a) There is a substantial risk that he will not conform to the conditions of parole;

"(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

"(c) His release would have a substantially adverse effect on institutional discipline; or

"(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date." Neb. Rev. Stat. § 83-1, 114 (1) (1976).

Respondents emphasized that the structure of the provision together with the use of the word "shall" binds the Board of Parole to release an inmate unless anyone of the four specifically designated reasons are found. In their view, the statute creates a presumption that parole release will be granted, and that this in turn creates a legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists.

It was argued that the Nebraska parole-determination provision is similar to the Nebraska statute involved in *Wolff v. McDonnell*, 418 U.S. 539 (1974), that granted good-time credits to inmates. There this Court held that due process protected the inmates from the arbitrary loss of the statutory right to credits because they were provided subject only to good behavior. This Court held that the statute created a liberty interest protected by due process guarantees. The Board argued in response that a presumption would be created only if the statutory conditions for deferral were essentially factual, as in *Wolff* and *Morrissey*, rather than predictive.

However, since respondents elected to litigate their due process claim in federal court, the Court was denied the benefit of the Nebraska Court's interpretation of the scope of the interest, if any, the statute was intended to afford to inmates. See *Bishop v. Wood*, 426 U.S. 341, 345 (1976). This Court accepted respondents' view that the expectancy of release provided in this statute was entitled to some measure of constitutional protection. But the Court emphasized that the statute had unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis.

Petitioner, like the respondents in *Greenholtz* is also arguing that California's statutory language itself creates a protectible expectation of parole only after a parole hearing has been held. Petitioner relies on the statute 3041 which provides:

In the case of any inmate sentenced pursuant to any law other than chapter 4.5. (commencing with Section 1170) of title 7 of part 2, The Board of Parole Hearings shall meet with each inmate during the sixth year before the inmate's Minimum Eligible Parole Date for the purposes of reviewing and documenting the inmate's activities and conduct

Pertinent to parole eligibility. During this Consultation, The Board Shall provide the inmate with information about the parole hearing process, legal factors, relevant to his or her suitability or unsuitability for parole and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs and institutional behavior. Within 30 days following the Consultation, the Board Shall issue its positive and negative findings and recommendations to the inmate in writing.

(2) One year before the inmate's Minimum Eligible Parole date. A panel of two or more commissioners or deputy commissioners shall normally grant parole as provided in section 3041.5. However, an inmate shall not be released before reaching his or her Minimum Eligible Parole Date as set pursuant to section 3046.

In petitioner's case the same emphasis is placed on the provision together with the use of the word "shall" that binds the Board of Parole to holding a parole hearing first and foremost to determine the question of parole suitability. In *Wolff v. McDonnell*, 418 U.S. 539 (1974) This Court held that due process protected the inmates from arbitrary loss of the statutory right to credits because they were provided subject only to good behavior. This Court held that the statute created a liberty interest protected by due process guarantees. Petitioner questions this Court into whether section 3041 creates a liberty interest protected by due process guarantees as set forth in *Wolff*. Based on parole release can only be obtained after a parole hearing has been held and the expectation of receiving the information that holds the keys to his liberty will be obtained in the parole hearing and no where else.

The lower Court's contention that California Penal Code 3041 does not create a liberty interest or a 14th Amendment due process right to such a hearing for parole is unconvincing. Because following *Ellis v. District of Columbia*, 318 U.S. App. D.C. 39 84 F.3d 1413, 1418 (D.C. Cir. 1996) Holding that, until the Supreme Court speaks more directly to the issue, Prisoners' right to pre release revocation hearings unaffected by holding in *Sandlin v. Conner*, 515 U.S. 472, 132 L.Ed. 2d 418, 115 S.Ct. 2293 (1995) we hold that the statute is sufficiently determinate to require such hearings are a matter of constitutional right.

In the District of Columbia Code provides:

That whenever it shall appear to the Board of parole that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his release is not incompatible with the welfare of society, and that he has served minimum sentence the Board may authorize his release on parole. D.C. Code 74-204. (a) This Statute creates no expectancy of release entitling a prisoner to due process protections. Even if a prisoner established everything the statute required the Board of parole still had discretion to deny parole. Yet, state laws may only give rise to a Constitutionally protected liberty interest if they contain substantive limitations or official discretion embodied in mandatory statutory or regulatory language. *Ellis v. District of Columbia*, 84 F.3d 1413, 318 U.S. App. D.C. 395, 1996 U.S. App. Lexis 12308 (1996).

"However," Sandlin did not overrule *Greenholtz* or *Allen* or any other Supreme Court decision. 115 S.Ct. at 2300 and n.5. To be sure, it abandoned the reasoning embodied in those opinions, at least insofar as applied to prisoners challenging the conditions of their confinement or the administration of the prison. In this situation, we think the only course open to us is to comply with the rule expressed in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 104 L.Ed.2d 526, 109 S.Ct. 1917 (1989): "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions" *Id.* at 484; see also *American Tracking Ass'n v. Smith*, 496 U.S. 167, 180, 110 L.Ed.2d 148, 110 S.Ct. 2323 (1990); *United States Currency*, 293 U.S. App. D.C. 384, 955 F.2d 712, 713 (D.C. Cir. 1992). Until the Court instructs us otherwise, we must follow *Greenholtz* and *Allen* because, unlike Sandlin, they are directly on point. Both cases deal with a prisoner's liberty interest in parole; Sandlin does not. And so we return to the language of the regulations."

By the time of the District Court's decision, the Supreme Court had settled on an approach to the due process clause that made the existence, or lack thereof, of a liberty in parole turn on the language of the regulations governing parole. While there is no Constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence," (*Greenholtz*, 442 U.S. at 7), a state's parole regulations might require release after a parole board "determines (in its broad discretion) that the necessary prerequisite exist" (*Board of Pardons v. Allen*, 482 U.S. 369, 376, 96 L.Ed.2d 303, 107 S.Ct. 2415 (1987)), in which event the state has created an expectation

of release rising to the level of a liberty interest within the meaning of the Due Process Clause. *Greenholtz, Allen and Hewitt v. Helms*, 459 U.S. 460, 74 L.Ed. 2d 675, 103 S.Ct. 864 (1983), came to stand for the proposition that a states "use of explicitly mandatory language", in connection with the establishment of "specified substantive predicates" to limit discretion, forces a conclusion that the States has created a liberty interest. "*Kentucky Dept of Corrections v. Thompson*, 490 U.S. 454, 463, 104 L.Ed. 2d 506, 109 S.Ct. 1904 (1989)."

The Court below has seriously misinterpreted *Greenholtz* and section 3041 by failing to distinguish between parole hearings that is Constitutional protected by the Due process clause based on a State created liberty interest and prison official's Arbitrary discretionary actions. The Court should correct that misinterpretation and make it clear that a prisoner eligible for a parole hearing should be allowed to appear and be afforded procedural Due process by having the opportunity to be heard at such a parole hearing.

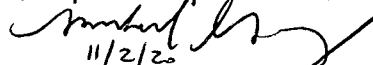
This case presents a fundamental question of the interpretation of this Court's Decision in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 60 L.Ed 2d 668 (1979). The questions presented is of great public importance because it affects the operations of the Prison Systems in all 50 states and the District of Columbia and hundreds City and County jails. In view of the large amount of litigation over the opportunity to be heard when eligible for parole hearing proceedings, guidance on the questions is also of great importance to prisoners because it affects their ability to receive eligible and fair hearings in proceedings that may result in months or years of added incarceration or harsh punitive confinement.

Conclusion

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

November 2, 2020

Respectfully Submitted,

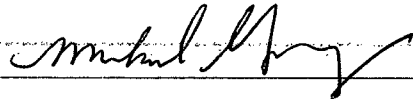


11/2/20
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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael A. Perry", is written over a horizontal line.

Date: November 2, 2020