

20-7525
No. 7525

ORIGINAL

In The Supreme Court Of The United States

Masao Kikuchi, pro se, Petitioner,
v.

Catherine S. Bauman, Warden, Respondent.

FILED

DEC 28 2020

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On Petition for Writ of Certiorari to the United States

Court of Appeals for the Sixth Circuit

Petition for Writ of Certiorari

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By: Masao Kikuchi, pro se, Petitioner Date: Dec. 28, 2020

Questions Presented

Question 1

Does substantive due process protect inmates in parole process?

Question 2

Is Sandin v. Conner, 515 U.S. 472 (1995) applicable to parole challenges?

Question 3

Is Vitek v. Jones, 445 U.S. 480 (1980) applicable to parole challenges?

List of All Proceedings Relevant to the Case

Petition for Writ of Habeas for the parole challenge was filed in the United States District Court for the Eastern District of Michigan Southern Division on April 13, 2020.

Civil No. 20:20-CV-11142

Masao Kikuchi, Petitioner v. Catherine Bauman, Warden, Respondent.
The petition was summarily denied.

Date of entry of the judgment: May 19, 2020

Motion for Certificate of Appealability filed in the United States Court of Appeals for the Sixth Circuit on June 4, 2020.

No. 20-1593

Masao Kikuchi, Petitioner-Appellant v. Catherine S. Bauman, Warden, Respondent-Appellee.

Certificate of Appealability was denied.

Date of entry of the judgment: October 22, 2020

Note: There was no state-court proceeding because Michigan statute does not permit state-court review of parole board decisions denying parole.

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Citations of Orders Entered by Courts

District Court: Unpublished. *Kikuchi v. Bauman*, Civil No. 20:20-cv-11142, 2020 U.S. Dist. LEXIS 88945 (E.D. Mich., May 19, 2020).

Circuit Court: Library has been closed due to COVID-19 outbreak in this facility. *Kikuchi v. Bauman*, No. 20-1593 (6th Cir., October 22, 2020).

Jurisdiction in this Court

"[A] state prisoner's challenge to the fact or duration of his confinement based upon the alleged unconstitutionality of state administrative action... is just as close as the core of habeas corpus as an attack on the prisoner's conviction." *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

For the present case, the habeas petition for parole challenge was filed in the district court on April 13, 2020 (No. 20-cv-11142) within one year limit set by the 6th circuit for parole challenges. The last parole denial was February 21, 2020.

On May 19, 2020, the district summarily denied the petition.

On June 4, 2020, the Notice of Appeal was filed in the district court within 30 days set by Fed. R. App. P. 4(a) (1)(A), and the Motion for Certificate of Appealability (COA) was filed in the 6th circuit court (No. 20-1593).

On October 22, 2020, the circuit court denied a COA.

This Petition for Writ of Certiorari is being filed through the prison legal mail service on Dec. 28, 2020 within 90 days set by the Supreme Court Rule 13.

Constitutional Provision Involved in the Case

First Amendment, "freedom of speech"

"It is, however, a basic First Amendment principle that 'freedom of speech' prohibits the government from telling people what they must say." *Agency v. AOSI*, 570 U.S. 205, 213 (2013).

Fourteenth Amendment, "liberty" and "due process"

Whalen v. Roe, 429 U.S. 589, 599-600 (1977) identified two types of interests protected by the right to privacy that is rooted in the substantive due process protections of the Fourteenth Amendment:

- Interest in "making certain kinds of important decisions"
- "[I]nterest in avoiding disclosure of personal matters"

"[T]he unconstitutional conditions doctrine, that vindicates the Constitution's enumerated right by preventing the government from coercing people into giving them up." *Koontz v. Jones River*, 570 U.S. 595, 604 (2013).

Statement of Case

Masao Kikuchi, pro se, Petitioner, is a citizen of Japan and currently serving a term of 10 to 30 years after a guilty plea of one count of CSC first degree and one count of child sexual abuse material. Catherine S. Bauman, Respondent, is the warden of the Michigan state prison where Petitioner is confined.

On February 21, 2020, Michigan parole board denied Petitioner's parole solely by the reason of his refusal to participate in the sex offender treatment program, which was placed upon Petitioner as a requirement by the board after the board over-rode the professional-psych-evaluation result which had waived the program requirement by placing Petitioner as low risk to re-offend.

Prior to the parole hearing, Petitioner sent multiple letters to the board, requesting the reasons for the board's over-riding action, and explaining why the program requirement violates Petitioner's Constitutional right and interests, but the board ignored them.

On April 13, 2020, Petitioner filed the habeas petition. See Appendix A 13 - A 33.

On May 19, 2020, the district court summarily denied the petition by changing Petitioner's claims and their grounds to something else. See Appendix A 1 - A 8.

On June 4, 2020, Petitioner filed Notice of Appeal in the district court and the Motion for Certificate of Appealability (COA) in the 6th circuit court. See Appendix A 34 - 44.

On October 22, 2020, the 6th Circuit court denied a COA by completely ignoring Petitioner's claims and their grounds. See Appendix A 11 - A 12.

Argument

Question 1

Does substantive due process protect inmates in parole process?

Substantive - Due - Process Claim for Fundamental Rights

(Unconstitutional Conditions Doctrine)

This Court clearly spoke for substantive - due - process protection, in *Koontz v. James River*, 570 U.S. 596, 608 (2013), by stating, "we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up Constitutional rights." The 8th circuit applied this protection to a parole case; "While inmates have no constitutional right to early parole, *Greeholtz v. Inmates of Neb.*, 442 U.S. 1, 7 (1979), Jackson does have the right to be free from unconstitutional burdens when availing himself of existing ways to access the benefit of early parole..." *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014).

For the present case, Petitioner identified fundamental right and interests in his habeas petition:

- Under the First Amendment: Right to be able to tell the truth.
- Under the Fourteenth Amendment: Interest in avoiding disclosure of

private sexual information and in making an important personal decision. See page 2 and Appendix A29 - A31. Then, Petitioner showed how these right and interests were violated, and how that affected his parole.

Petitioner explained that Michigan sex offender treatment program (MSOP) requires Petitioner to disclose private sexual information (including his daughter's) to other inmates. See Appendix A27. Then, the district court changed Petitioner's 14th-Amendment claim to the issue of "acceptance of responsibility" and "self-incrimination" (5th Amendment), so that a well-established denial reason can be used. See Appendix A5 - A6. Petitioner admitted everything and took full responsibility of the offenses even before he was charged for the offenses. Protecting his daughter was his only concern. See Appendix A27.

For the First-Amendment claim grounded on the right to be able to tell the truth, MSOP requires its participants to admit what is in the pre-sentencing investigation report (PSI). Petitioner's PSI contains much fabricated information. See Appendix A27 - A28. If Petitioner tells the truth instead of admitting what is in PSI, he will be expelled from MSOP, which will result a mandatory and automatic disqualification for parole. See Appendix A31.

The circuit court ignored Petitioner's claims and their grounds, and denied a COA by the reasons of "no inherent constitutional right to parole" and "the laws of Michigan do not create a liberty interest in parole," which have no relevancy to Petitioner's claims and their grounds. See Appendix A11.

This circuit-court's action is contrary to this Court's clearly-established precedent stated in *Koontz*.

The circuits are divided on this issue. Many circuits have been rejecting all sorts of parole challenges by the reasons of no constitutional right to parole and no state-created liberty interest whereas the 8th, 9th, and 10th circuits have applied the substantive-due-process protections to parole cases as shown above for the 8th circuit, even though there is no constitutional right to parole.

Substantive-Due-Process Claim for Non-Fundamental Rights

For complete substantive-due-process protections against parole boards' arbitrary actions, the province of non-fundamental rights needs to be also recognized.

"[E]ven though a person has no right to a valuable government 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." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

For the present case, in his habeas petition, Petitioner cited the 6th circuit's interpretation of substantive-due-process protection for non-fundamental rights. In *Valot v. Southeast Local School*, 107 F.3d 1220, 1228 (6th Cir. 1990) (followed by *Handy-Clay v. City of Memphis*, 695 F.3d 531, 547 (6th Cir. 2012)), the court stated, "Where government action does not deprive [Petitioner] of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest." Petitioner pointed out that Michigan

statute indicates that the safety of societies outside of the United States is not part of Michigan's interests for the purpose of parole release. Thus, the board's stamped parole denial reason of "menace to society" is not "rationally related to a legitimate state interest" for Petitioner's case since the society to which he is returning is in Japan. See Appendix A20-A23 and A45.

The district court changed Petitioner's substantive-due-process claim to something else which had no relevancy to his claim. Then, while stating the fabricated claim was Petitioner's, the court rejected the claim. See Appendix A4.

The circuit court totally ignored Petitioner's substantive-due-process claim as if it had never been presented. Then, the court stated its denial reasons which had nothing to do with Petitioner's claim. See Appendix A11-A12.

Question 2

Is *Sandin v. Conner*, 515 U.S. 472 (1995) applicable to parole challenges?

Liberty Interest under Sandin

"Sandin abrogated Greenholtz's and Hewitt's methodology for establishing the liberty interest..." *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005).

After Sandin, the circuits were divided. Many circuits consider Sandin does not apply to parole challenges, but some circuits apply Sandin to parole cases. In *Wilson v. Jones*, 430 F.3d 1113-24 (10th Cir. 2005), the court held that "the state's action here deprived [Petitioner] of a liberty

interest because the mandatory and automatic consequence of [his failure to participate in a treatment program] inevitably affected the duration of his sentence." Id. at 1124. Under Sandin, a liberty interest is established when government actions "inevitably affect the duration of his sentence." Sandin, at 487.

For the present case, Petitioner's parole was denied solely by the reason of his refusal to participate in the treatment program. This parole denial was not discretionary, but mandatory and automatic consequence which was directly resulted from Petitioner's refusal for the program participation as in Wilson. Thus, the board's action of placing such a treatment-program requirement upon Petitioner established a liberty interest under Sandin. See Appendix A24. Petitioner sent multiple letters to the board, requesting the reasons for the board's placing the treatment-program requirement after over-riding the professional-psych-evaluation result which waived the program requirement, and explaining why the program requirements violate his constitutional right and interests, but the board did not reply. Hence, Petitioner's liberty interest established under Sandin was deprived without any due process protection at all. The lower courts completely ignored this claim under Sandin as if it had never been presented.

Question 3

Is Vitek v. Jones, 445 U.S. 480 (1980) applicable to parole challenges?

Liberty Interest under Vitek v. Jones

The 9th circuit took a different approach instead of relying on Sandin; "because state's regulations render the inmates completely ineligible for parole if [SOTP is] not satisfactorily completed... This coercive component of SOTP is functionally equivalent to the psychiatric treatment required by the state at the issue in Vitek." Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997). "We conclude that the inmates possess a protected liberty interest... the due process protections... under Wolff." Neal, at 833. See Appendix A25.

In Wolff v. McDonnell, 418 U.S. 539, 557 (1974), this Court described due-process protections as "minimum procedures appropriate under the circumstances... to insure that the [interest] is not arbitrarily abrogated." The great majority of the circuits, however, appears to be forgetting Wolff and misapplying Greenholtz's conclusion; parole hearing and a notice after the hearing are adequate for a due-process protection. They are neglecting how a parole hearing is held and how much protection it provides in each state is different from Nebraska's at the time of Greenholtz.

Petitioner's claim under Vitek was completely ignored by the lower courts as if it had never been presented.

Conclusion

Substantive-due-process protections apply to parole process and cannot be defeated by the reasons of "no inherent constitutional right to parole" and/or no state-created

liberty interest in parole.

Even if state statutes do not create liberty interests in parole release, liberty interests to protect inmates in parole process can be established under Sandin and Vitek.

Once such interests are established, they are under due-process protections which require minimum procedures appropriate under the circumstances to insure that the interests are not arbitrarily deprived.

Success of rehabilitations relies on fairness in the process. See *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

The Right to Access the Courts

This Court has established that prisoners have a fundamental right to access the courts in a series of important cases, including *Ex parte Hull*, 312 U.S. 546 (1941), *Johnson v. Avery*, 382 U.S. 483 (1969), and *Bounds v. Smith*, 430 U.S. 817 (1977).

In the present case, the district court changed Petitioner's claims and their grounds to something else so that the petition can be easily shut out. Then, the circuit court approved this district court's action and denied a COA.

These lower courts' actions are functionally equivalent to denial of the right to access the courts. If these lower courts' actions are allowed to stand, it is a serious breakdown of the United States court system.

Respectfully submitted by:

Masao Kikuchi, pro se, Petitioner

Dec. 28, 2020