No._____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT RODRIQUEZ TREVIÑO,
Petitioner,

v

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION 1

Whether the Fifth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's Rule 10 supervisory power when:

1) It failed to determine whether the State of Texas parole statutes provided a limited due process requirements related to providing inmates a limited review process in determining whether or not an inmate medical condition qualified for consideration in the State of Texas' Medically Recommended Intensive Supervision ("MRIS') under the requirements of requirements of Tex. Gov. Code §508.146 and Texas Department of Criminal Justice's Policy Manuals interpreting the relevant statutes and regulations;
2) It failed to determine whether the Texas Department of Criminal Justice has denied Petitioner any information or discovery on whether his medical condition has been reviewed under the MRIS policy and whether the District Court had erred in denying Petitioner's Motion for Discovery to determine what if any procedure had been employed under the MRIS policy and procedures; and

3) It failed to recognize that Petitioner had provided sufficient evidence to determine that he had set forth the elements to determine that he had a limited liberty interest under the provision of this Court's case law in such cases as Greenholtz,

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.[1]

[1] Bobby Lumpkin is the current Director of the Texas Department of Criminal Justices Correctional Institutions Division and thus the proper party as Respondent. However, it should be noted that the director of that Department changed during the course of litigation from the District Court through the Fifth Circuit and thus other names will appear in some of the documentation.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petition respectfully pray that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

1. The Order of the United States Court of Appeals for the Fifth Circuit, No 3:19-CV-324 which appears at Appendix A.
2. The judgment of the United States District Court, Southern District of Texas, Galveston Division, No 3:19-cv-324 which appears at Appendix C.
3. The Memorandum Opinion and Order of of the United States District Court, Southern District of Texas, Galveston Division, No 3:19-cv-324 which appears at Appendix D.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Petitioners have asserted and asserting in this petition that the holding of the Fifth Circuit conflicts with the holdings of other courts of appeal or has so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's supervisory power, as provided for in Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eight Amendment

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STATEMENT OF THE CASE

I. PETITIONER'S STATEMENT OF POSITION

A. Petitioner's Right to Limited Due Process under *Greenholtz v. Inmates of Nebraska Penal* & *Corr. Complex,* 442 U.S. 1 (1979)

Petitioner Robert Rodriguez Treviño, TDCJ no. 729766, is and has been a prisoner in the Texas Department of Criminal Justice system since 1995 based upon his conviction for aggravated sexual assault. All challenges to his original conviction have been denied, all timeframes past. The original conviction and his appeals therefrom are not at issue in this matter. Instead, this is a challenge under his Petition for a Writ of Habeas Corpus under 28 U.S.C. §2253(c)(f) for denial of his limited liberty interest to due process in the review of his application for Medically Recommended Intensive Supervision (MRIS), a form of parole, under the provisions of Tex. Gov. Code §508.146. Such a right is provided for under *Greenholtz v. Inmates of Nebraska Penal* & *Corr. Complex,* 442 U.S. 1, 7 (1979). Petitioner asserts that , both at the District Court, Southern District of Texas, Galveston Division, and at the U.S. Fifth Circuit Court of Appeal, that: (1) he submitted evidence to support a substantial showing he was denied his limited conditional liberty interest in receiving due process to have his medical condition reviewed and considered under Texas statute and regulations and procedures for his eligibility for MRIS under the provisions of Tex. Gov. Code §508.146; 92) that

he was improperly blocked in this effort by the denial of the District Court of his Motion Requesting Approval of Subpoenas, the discovery from which would have shown that he was not given his due process procedural rights under *Greenholtz;* and (3) even without discovery, he presented evidence of issues that "are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Since Petitioner is still an inmate serving his sentence, he is not asserting he has a liberty interest to receive MRIS, but only are right to limited due process in the TDCJ's procedure in considering his application for MRIS, a form of parole.[1]

B. Facts Material to Consideration of Issue Presented

Petitioner is currently being held in the J. Montford Unit in Lubbock Texas although he was at the Carole Young Medical Facility near Galveston and in the Galveston Division of the Southern District of Texas when this litigation began. Since the beginning of this litigation and long before, his physical and mental health have been greatly compromised and continue to degenerate. He can no longer walk or care for his basic needs, including going to the bathroom, bathing and having his diapers changed. He is confined 100% of the time either to a medical wheelchair or to his bed.

[1] Nor is he challenging his original sentence from 1996.

In addition to his deteriorating physical condition, he has schizophrenia and other mental issues. One of the provisions of Tex. Gov. Code §508.146 provides a right to request and be considered for Medically Recommended Intensive Supervision (MRIS), which are further defined by the provisions of TDCJ Policy Manual A-086 and certain other regulations.[2] In February 2019, Petitioner's sister Gloria Treviño under the power of attorney given her by Petitioner and the undersigned as his attorney submitted an application for MRIS to TDCJ.[3] This request was extensively research, including Petitioner's medical records at both TDCJ and the Veterans Administration and other documentation. zit is 23 pages long with extensive citations to TDCJ procedures and Petitioner's deteriorated medical condition.[4] It was supported by 11 exhibits comprising an additional 77 pages.[5] However, within only a few days after it had received the request and, as Petitioner asserts, without the necessary time for TDCJ to follow its own officially adopted review procedures,[6] TDCJ responded with a one-page denial letter dated February 27, 2019, which said only:

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[2] A copy of these regulations is found at ROA, Vol. 28, pp. 8565-8583

[3] ROA, Vol 2, pp 385-490. found as Exhibit H to the Petition

[4] ROA Vol. 2, pp 385-413

[5] ROA Vol. 2, pp 385-413; ROA Vol. 2, pp 414-491

[6] There several such documents. See ROA, Vol. 2, pp 361-363 and Vol. 1 pp.117-121

> Information submitted to this office by the unit medical provider indicates the Offender's condition does not meet the clinical criteria for MRIS at this time."[7] [8]

The undersigned then began a long effort to obtain records from TDCJ and the University of Texas Medical Branch (UTMB), its medical subcontractor that provides the medical care for inmates under a contract, showing the basis for the decision and the procedure used to arrive at the conclusion. Numerous requests were made under the Texas Open Records Act, Tex. Gov. Code Tex. Gov. Code Chapter 552 to find out these reasons. The undersigned sent numerous Open Record Request letters to many different divisions of TDCJ requesting this information as well as to UTMB.[9] These multiple details came to naught. To date this remains the sole explanation Petitioner has been able to obtain from TDCJ

Frustrated by the inability of obtain the documentation showing the procedure that was used and the basis for denial, Petitioner filed his Petition for a Writ of Habeas

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[7] ROA Vol 28, p 8336 . Under the offenses he is convicted of, there are very narrow grounds for Petitioner to qualify that basically require organic brain damage which Petitioner believes he is eligible for.

[8] ROA Vol 2 p.369

[9] These efforts are detailed in paragraphs 34-48 of his Petition for Writ of Habeas Corpus (ROA Vol 1, pages 25 through 35 and supported with Exhibits I through R, with 72 pages of documentation

Corpus under 28 U.S.C. §241 in the Southern District of Texas, Galveston Division.[10] The court accepted the Petition and ordered TDCJ to answer. In addition and because he had been unable to get information from TDCJ documents its procedure and specific's for the denial, Petition filed a Motion Requesting Approval for Subpoenas (Motion for Subpoenas), along with the supporting documentation showing the failed efforts to obtain the records from TDCJ.[11] Before the District Court acted on the Motion for Subpoenas, TDCJ filed a Motion for Summary Judgment.[12] Petitioner filed his response and in his response, addressed the need for discovery and his rights to limited due process under *Greenholtz*.[13] On August 5, 2020, the District Court granted TDCJ's motion for summary judgment, dismissed the Petition for Writ of Habeas Corpus and denied the Motion for Subpoenas.[14] It also denied a Certificate of Appealability under Rule 11 of the Rules Governing Section 2252.[15] In its opinion, the District Court only addressed *Greenholtz* for the black letter principle that a prisoner has

[10] The Petition is found at ROA Vol 2, pp 306-596

[11] ROA Vol 28, pp 8302 -8422 Document 9, civil docket for Treviño v. Davis, #3:19-cv-00324

[12] ROA Vol 28, pp 8423-8527, Document 10, civil docket for Treviño v. Davis, #3:19-cv-00324.

[13] ROA Vol 28, pp 8524- 8500, Document 14, civil docket for Treviño v. Davis

[14] Appendix D, Memorandum Opinion and Order, p. 19.

[15] Appendix D, Memorandum Opinion and Order, pp 17-19

no constitutional right to be conditionally released before the expiration of his sentence but did not mention *Greenholtz* for its other principle that the may be a limited liberty interest in due process in the parole procedure and that the court should:

> turn to an examination of the statutory to determine whether they provide the process that is due in these circumstances. It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. s,* 408 U.S., at 481, 92 S.Ct., at 2600

Thus, the fundamental basis for this Petition for Writ of Certiorari, the failure of the District Court to examine whether there was a denial of Petitioner's limited right to due process in the MRIS procedure. Court. Because the District Court denied a Certificate of Appealability, Petitioner appealed to the Fifth Circuit Court of Appeals, filing a Motion for a Certificate of Appealability.[16] Petitioners Motion for a Certificate of Appealability was denied on 7/14/21 in a short 2-page opinion in an order signed by Stuart Kyle Duncan, United States Circuit Judge. (Appendix A, Order of the United States Court of Appeals for the Fifth Circuit, No. 3-19-CV-324). This decision did not address the *Greenholtz* case at all and showed no indication that the Fifth Circuit had addressed Petitioner's claim he was potentially denied his limited liberty interest in due process in the State's consideration of his MRIS request. For these flaws in the Fifth

[16] Appellant's Motion for a Certificate of Appealability, filed on 11/24/2020 and a Brief in Support of Motion for Certificate of Appealability filed on 11/30, 2020.

Circuit's opinion as it applies to the facts of this case, this is why Petitioner has filed this Petition for Writ of Certiorari, requesting that a fundamental unfairness placed upon him by the Fifth Circuit be lifted. Otherwise, he is left with no remedy when there is clearly a remedy under *Greenholtz*.

II. REASONS WHY THE WRIT SHOULD BE GRANTED

As set forth above, the District Court granted TDCJ's Motion for Summary judgment, dismissed Petitioner's Petition, denied Petitioner's Motion for Subpoenas and denied a Certificate of Appealability.[17] Petitioner was forced to file a Motion for a Certificate of Appealability but included his reasons for asking for a writ of habeas corpus to determine what limited due process rights Petitioner had in the process of determining his eligibility for MRIS release based upon his request for MRIS and whether TDCJ had giving him the limited due process rights he might have under the authority of *Greenholtz* and other cases on that matter from this Court. Because Petitioner had been denied numerous times in his efforts to get the documentation supporting the decision and the process used through his numerous requests and because the District Court had denied his Motion for Subpoenas to get this information in the lawsuit, Petitioner was in a trap. He was being denied his ability to get documentation that might well show a violation of his limited due process rights, not

[17] District Court's Memorandum Opinion, Appendix D

only by the Defendant, the District Court and the Fifth Circuit. Yet his burden to go forward and make a substantial showing yet the decision of the Fifth Circuit is fatal to his efforts not just to obtain a Certificate of Appealability but also to establish he was entitled to enforce his limited due process rights if TDCJ had not given them to him in his MRIS process request. In other words, he was denied his right to meet the burden set for him both under the law and under the ruling of the Fifth Circuit:

> To obtain a COA, Trevino must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy that burden, he must show that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or could conclude the issues he presents "are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).[18]

And he presented of his argument before the Fifth Circuit in his Brief in Support of Motion for Certificate of Appealability,[19] especially on pages 15-19 but also throughout the brief with respect to his due process rights under the Principles of Greenholtz. Moreover, he also briefed for the Fifth Circuit the Procedural Requirements in the Texas MRIS process that invoke due process on pages 20-25.[20] Finally, he also briefed for the Fifth Circuit his argument as to why he was entitled to

[18] Appendix A. Order of the Court of Appeals for the Fifth Circuit.

[19] Fifth Circuit Docket for Treviño v. Lumpkin, No. 20-40589, filed 11/30/2020, Document:0051565512,

[20] Id.

limited discovery through his Motion for Subpoenas on pages 25-25.[21] Nonetheless, in its short two-page opinion, the Fifth Circuit did not address these issues. Consequently, Petitioner asserts that the Fifth Circuit has confined him to a box he cannot escape by denying him the one mechanism available to him to escape. This action by the Fifth Circuit so departs from the accepted and usual course of judicial proceedings as to call for exercise of this Court's Rule 10 supervisory power. If a party is denied his right to discovery of a crucial element he must present, i.e. a "substantial showing" he was denied his limited right of due process in the MRIS process, especially when he has set forth extensive evidence of the denial of his right to get this information from TDCJ, i.e., the extensive Open Records Request, as well as extensive evidence that the State of Texas has itself established certain procedures that will *Greenholtz*, then he has further been denied due process by the Fifth Circuit (and the District Court). Afterall, if Petitioner is allowed to get this discovery, it might show that he did receive the due process he was due and thus there is no basis for a writ of habeas corpus. Right now, it is fair to say that we don't know, either Petitioner or the District Court or the Fifth Circuit or this Supreme Court. But it is fundamental wrong to say he must provide this information, but he won't be allowed to use the well-established procedure of discovery to find out.

[21] Id.

III. ARGUMENT

As set out above, TDCJ improperly refused Petitioner lawful requests under the Texas Open Records Act, Tex. Gov. Code Chapter 552, to explain and show the procedure it used in denying his MRIS request, there is no way to see if it met the limited due process right established under its own procedure. This problem was compounded when the District Court denied Petitioner's Motion for Subpoenas to discover this information, the only legal remedy he then had. Finally, the Fifth Circuit did not address this issue, thus leaving him in this impossible bind. Essentially he was being told by both courts that he had not made a substantial showing, but they would block the only method he then had to do so: discovery through subpoena, to obtain the needed facts, fundamentally unfair.

To understand how unfair, it is perhaps good to see what information the State, the District Court and the Fifth Circuit had before him. What is at issue is his Petition for Writ of Habeas Corpus related to his right to obtain his due process in being considered for MRIS under the provisions of Tex. Gov. Code §508.146 and two TDCJ Policy Manuals. The Petition for Writ of Habeas Corpus was not a quickly thrown together document. It is 52 pages long and has 19 exhibits. In total this is 239 pages.[22]

[22] ROA Vol. 2, pp. 306-592. The ROA are reflected the numbers from the record filed at the Fifth Circuit by the District Court Clerk of the Southern District of

In the Petition he seeks relief related to his request to TDCJ for Medically Recommended Intensive Supervision ("MRIS'), filed in the Spring of 2019 under the provisions of Tex. Gov. Code §508.146 and TDCJ Policy Manual on Medically Recommended Intensive Supervision (MRIS) Screening.[23] He seeks relief under MRIS because he is completely and totally physically and mentally disabled and asserts he meets all criteria for relief as established by TDCJ. The application for MRIS submitted to TDCJ is found as Exhibit H to the Petition.[24] This application is 23 pages long with 11 exhibits, comprising an additional 77 pages.[25]

Petitioner, and in particular the undersigned and Petitioner's sister who cares for him, prepared and submitted this extensive and well-documented application asserting he is qualified to be released under medical supervision under the provisions of §508.146 and the TDCJ's MRIS policies. Yet the extensive request was quickly denied without any adequate explanation of why. Because of the rapidity of the denial, counsel and Petitioner's sister began a long and laborious effort under the Texas Open Records

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Texas. There are 28 Volumes in the ROA and a total of 8655 pages.

[23] ROA, Vol. 2, pp. 361-363

[24] ROA Vol. 2, pp 385-413

[25] ROA Vol. 2, pp 414-491

Act, Tex. Gov. Code Chapter 552 to find out these reasons.[26] The undersigned sent numerous Open Record Request letters to many different divisions of TDCJ requesting this information. These efforts are detailed in paragraphs 34-48 of the Petition for Writ of Habeas Corpus (ROA Vol 1, pages 25 through 35 and supported with Exhibits I through R, with 72 pages of documentation.

Counsel believes it is necessary to call attention to the extensive record that was presented to the District Court, including pleadings, correspondence, medical records and other records related to the issues of the MRIS process because these documents not only the severe physical and medical condition of Petitioner, but also the TDCJ regulations for the TDCJ process for determining eligibility for MRIS and the stonewalling of TDCJ to provide proof the process was followed. Petitioner realizes that merely being eligible for MRIS does not establish a right to MRIS; however, he has a due process right for TDCJ to follow its procedures, regardless of the outcome. And there is so much information that should be considered. The Record On Appeal (the ROA) submitted to the Fifth Circuit is enormous. It consists of 28 volumes with 8655 pages (ROA: 20-40589.5 to 20-40589.8655.) While great majority of these were medical records of Petitioner while at the TDCJ that had previously been obtained from TDCJ

[26] These efforts are detailed on ROA Vol 1, pages 25 through 35, paragraphs 34-48 of the Petition for Writ of Habeas Corpus, as well as the exhibits attached to the Petition.(ROA, Vol 1, pp 191-221)

and its subcontractor UTMB at an earlier time. These medical records run from Volume 3 through most of Volume 27. However, the other documentation, including pleadings, some medical records, TDCJ policies and procedures and other documents, consists of 970 pages (ROA: the entirety of Volumes 1 & 2, pp 5-598; 14 pages of Volume 27 and the entirety of Volume 28, 360 pages.) As can be seen, MRIS request was extensively documented with medical records, including some of Petitioner's medical records from the Veteran Administration that detail his brain damage.[27] As set forth below, Petitioner asserts there is no way that he was given even the limited due process rights he had under *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979) in the short period of time TDCJ had the documents. In addition, Petitioner also respectfully asserts that the review by the District Court and the Fifth Circuit of all these materials shows a failure to focus upon the issue of the denial of the limited due process rights Petitioner had in the MRIS process, especially because the TDJC and its Medical Contractor, the University of Texas Medical Branch, failed to produce any documentation at all on the review process and the documentation supporting the opinion of lack of eligibility for MRIS. Petitioner filed his Motion Requesting Approval For Subpoenas, ROA Vol. 28, pp 8302-8317 with 8 exhibits with 68 pages, Vol 28, pp 8318 – 8385. Under Habeas Corpus proceedings, Rule 6 of the Rules Governing Section

[27] ROA, Vol. 2, pp 425-428

2254 Cases in the United States District Courts, it is necessary to obtain the courts approval for discovery and subpoenas for records. The denial of the District Court of Petitioner's Motion for Subpoenas to TDCJ to obtain such information. Page 19 of Appendix D, Memorandum Opinion and Order of the United States District Court, Southern District of Texas, Galveston Division No 3:19-cv-324 Moreover, both the MRIS request and the Petition for Writ of Habeas Corpus were extensively researched and documented, and not just slight document put together by a prisoner.

What is crucial to Petitioner's this Petition for Writ of Certiorari is the fact that absolutely no records were obtained for TDJC supporting or reflecting the reasons for its rejection of Petitioner's request for MRIS despite the fact that Petitioner tried with his Open Records Requests and Motion for Approval for Subpoenas. In fact, the sole reason given by TDCJ for rejecting the MRIS request is contained in it February 27, 2019, letter to counsel which, as set out above, says only "does not meet the clinical criteria for MRIS at this time."[28] There is no explanation as to why so there is no way to determine why this decision was made. Moreover, as shown in the many pages of correspondence between the undersigned and TDCJ cited above, Petitioner's counsel was often sent on a circle with no result. It is also important to note that Open Records Requests were not only sent to TDCJ divisions, but also to the University of Texas

[28] ROA, Vol 28, p 8336

Medical Branch (UTMB).[29] UTMB provided health care services care to Petitioner as well as to most other prisoners pursuant to a contract between UTMB and TDCJ.[30] This contract lays out respective obligations between TDCJ and UTMB related to determinations related to MRIS requests.

Frustrated in getting nowhere, Petitioner filed the Petition for Writ of Habeas Corpus. Petitioner also filed a Motion Requesting Approval for Subpoenas and Brief in Support seeking subpoenas for documents from the TDJC on records supporting the denial of the MRIS which it had failed to produce pursuant to many requests under the Texas Open Records Act, Tex. Gov. Code 552. The motion for subpoenas is found as Appendix K and the motion was necessary because of the specific rules and limitations for discovery in habeas corpus proceedings. Such discovery does require court approval in Habeas Corpus procedures. However, before the discovery motion was considered by the District Court, Respondent filed a Motion for Summary Judgment. In his Response, Petitioner detailed the legal basis for a limited scope of due process rights for prisoners seeking release under parole provisions of state law. These due process rights are detailed below.

[29] See Exhibits L-N of to the Petition, ROA Vol 2, pp 506- 539.
[30] Exhibit S of Petition, ROA Vol 2, pp 565-596

The District Court granted the motion for summary judgment, dismissed Petitioner's Petition and also denied Petitioner's motion for subpoenas. It also denied appealability to Petitioner. The Memorandum Opinion and Order granting Respondent's Motion for Summary Judgment, and denying the motion for subpoenas and denying appealability is found at Appendix D. The Judgment dismissing Petitioner's Petition with Prejudice is found at Appendix C.

On September 4, 2020, Petitioner filed his Notice of Appeal to the Fifth Circuit (Appendix B). Thereafter, Petitioner filed his Motion to Issue Certificate of Appealability and brief in support. (Appendix M) The Motion and Brief addressed Petitioner's right to appeal and his right to a limited scope of due process for the consideration of his request for MRIS and his need for discovery on the issues.

On July 14, 2021, the Fifth Circuit issued its Order denying the Motion to Determine Appealability (Appendix A). With respect to Petitioner's claims, the Opinion merely stated:

> To obtain a COA, Trevino must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy that burden, he must show that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or could conclude the issues he presents "are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

This Opinion does not address the merits of Petitioner's argument that he was denied the level of limited due process for parole request under the Texas Parole Statues and the Eight and Fourteenth Amendments and the most significant point of the Petition for a Writ of Certiorari: The Court of Appeals affirmed the denial by the District Court of the basic mechanism for Petitioner to obtain the information as to whether the limited due process right for the Texas State's review process for MRIS eligibility for Petitioner. And this is crucial. For example, the discovery through approval of the requested subpoenas might have shown that Petitioner did receive the process he was due and thus he does not have a further right to his Petition for a Writ of Habeas Corpus. Then this case would be over. However, until that information is provided, there is no way for reasonable jurists to find whether the District Court's assessment of the constitutional claim is "debatable" or "wrong." Petitioner's constitutional claims were argued in his response to TDCJ's Motion for Summary Judgment at the District Court level and also argued in his Appellate brief supporting his Motion for a Certificate of Appealability at the Fifth Circuit. Petitioner is entitled to a limited scope of due process related to his situation and MRIS application pursuant to a line of cases from this Court, indicated in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S.1,7 (1979) and several others.

In summary, Petitioner extensively briefed and prepared his application for MRIS, noting the legal basis for limited due process rights under Texas law, and in particular Tex. Gov. Code Chapter 508. The Fifth Circuit, however, completely ignored this extensive documentation detailing the MRIS procedure under Texas law and TDCJ regulations and this Supreme Court's line of cases on the limited right to a due process procedure under state laws relating to grants of parole, and, most significantly, ignored the District Court's blocking of Petitioner from his one avenue to determine if the due process steps he was entitled under Texas parole statute and TDCJ's fundamental MRIS procedures.

The argument of Petitioner with respect to his position is simple. He asserts that the denial by the Fifth Circuit and the District Court of a Certificate of Appealability is incorrect because the facts set forth by Petitioner with respect to the denial of his request for MRIS under Chapter 508 of the Tex. Gov. Code and §508.146, (including Chapters 11 and 62, Tex. Code. Crim. Proc.) and TDCJ promulgated regulations on the procedure for MRIS found in TDCJ Policy Manuals,(Appendices H & I) do invoke the due Process Clause of the Fourteenth Amendment for a limited scope review. In addition, the Fifth Circuit did not undertake the analysis of such rights in the case-by-case basis established by this Court such cases as *Greenholtz* and *Morrissey*.

It is axiomatic that, with respect to parole, the inmate has no basic due process right under the Fourteenth Amendment to parole to the extent it is discretionary. However, there is a limited exception to this exclusion. In *Greenholtz,* this Court addressed a prisoner's liberty interest in discretionary parole. The plaintiffs claimed that the State of Nebraska did not afford them sufficient procedural protection before deciding whether to grant them discretionary parole. This Court looked to the Due Process Clause as a potential source of a liberty interest and determined that, because prisoners are not entitled to discretionary parole, but merely desire or expect it, the Due Process Clause standing alone provides no protectible interest. His conviction "has extinguished that liberty right" *Greenholtz,* 442 U.S. at 8. Petitioner concedes that this general rule applies in his case. However, there is still the limited due process rights to a prisoner on a procedure established by a state under *Greenholtz.*

Although these rights may indeed not be extensive, they nonetheless exist. As set forth below, a prisoner can have limited procedural protections under the state law relating to the procedure relating to the consideration of parole and it is necessary to turn to an examination of the statutory procedures to determine whether they provide the process that is due in these circumstances. As *Greenholtz* explains, courts should:

> turn to an examination of the statutory to determine whether they provide the process that is due in these circumstances. It is axiomatic that due process 'is

> flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. s,* 408 U.S., at 481, 92 S.Ct., at 2600."

Greenholtz at 12. If such limited rights related to a procedure in determining a right to MRIS under Texas law. Petitioner has a right to these procedures and has a right to assert them. Petitioner asserts that the facts before this Court and which were before both the Fifth Circuit and the District Court establish that he made a substantial showing "debatable among jurists of reason" as to his entitlement to appellate review of his claims in accordance with *Drinkard v. Johnson*, 97 F.3d 751, 755-56 (5th Cir. 1996). Moreover, Petitioner need not show that the appeal will succeed to continue with his appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner sets forth in his argument below the particular bases which show that there is a procedure set out in the statute and procedures adopted by TDCJ to either approve or deny a request for MRIS. This is the barebones due process procedure afforded to Petitioner. Moreover, it is of great importance that, if such a barebones due process exists, he also has the right to know the specifics of why he did not meet the criteria used by TDCJ in applying it's "criteria." Unless Petitioner and the courts can know such information, they cannot determine if the MRIS procedure, shown below, was followed. But as shown below, despite counsel's many requests to obtain this information under the Texas Open Records Act and his attempt to subpoena these documents through discovery at the District Court level, he was denied this right, and

this Court is now denied that information on review. In other words, without the necessary discovery, it is impossible to determine whether the TDCJ gave him any process at all. This is fundamentally unfair because, without this discovery, neither he nor any court can say that he was given all the limited bare-boned due process that was due. TDCJ hid the ball on what process and elements it used to make the decision, and despite efforts by Petitioner to retrieve them, the Fifth Circuit and District Court basically rubber-stamped this denial when a simple effort of allowing the subpoenas to go forward could have answered the question one way or the other. At the bare minimum, Petitioner should be allowed the discovery he sought in his Motion for Discovery.

I. ARGUMENT

Petitioner asserts he made a substantial showing for a certificate of appealability under Fifth Circuit law and he is entitled to one if he makes a substantial showing of the denial of a federal constitutional right. *Drinkard v. Johnson*, 97 F.3d 751, 755-56 (5th Cir. 1996). A "substantial showing" means that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the issues are adequate to deserve encouragement to proceed further. Id. at 755. The Petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The argument that Petitioner has set forth both a "substantial showing" as well as the fact that the MRIS procedure propounded by TDCJ set forth in *Greenholtz*

A. Petitioner Has Asserted a Case Denial of Due Process Under *Greenholtz*.

Petitioner asserts that his right to obtain a parole and Medically Recommended Intensive Supervision ("MRIS') falls under the requirements of requirements of Tex. Gov. Code §508.146, Parole and Mandatory Supervision, which is discretionary. However, it is discretionary only under the procedures of the Tex. Gov. Code §508.146 and the TDCJ MRIS requirements (Appendices H & I). Petitioner asserts that he has a conditional liberty interest in receiving due process under the facts of this case even through it relates to the granting of parole. Such right is firmly established under precedence of the United States Supreme Court. Some parole decisions by a state must meet certain due process standards. *Morrissey v. Brewer*, 408 U.S. 471 (1972). *Morrissey*, however, dealt with parole revocation, not the granting of parole. *Morrissey* at 481-484[31] The issue with the granting of parole itself is considered in *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1 (1979). In *Greenholtz*, Nebraska inmates sued

[31] "There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a constitutional liberty that one desires." *Greenholtz* at 9

the Nebraska Board of Parole claiming they had unconstitutionally denied parole. The Court granted certiorari:

> to decide whether the Due Process Clause of the Fourteenth Amendment applies to discretionary parole release determinations made by the Nebraska Board of Parole, and, if so, whether the procedures the Board currently provides meet constitutional requirements. Id at 3.

The Nebraska statute provided for both mandatory and discretional parole. The Court examined only the discretionary provision and looked at whether the inmates had some type of constitutionally protected "conditional liberty" interest similar to that as recognized in *Morrissey*. *Greenholtz*, as cited by the District Court below (Appendix D) for this principle "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence," 442 U.S. at 7. However, the quoted statement does not mean there is no longer a right to due process interest in the state proceedings for decision's granting or denying parole:

> The parole release decision, however, is more subtle, and depends on an amalgam of elements, some of which are factual, but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual. The parole determination, like a prisoner transfer decision, may be made for a variety of reasons, and often involve[s] no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate. *Meachum v. Fano*, 427 U.S. at 225. The decision turns on a discretionary

> assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become, rather than simply what he has done.

Greenholtz 442 U.S. at 10-11. In defining what due process rights and "protectible entitlement" are involved, the Court states that such "must be decided on a case-by-case basis and that the Court examine the statutory procedures and be flexible in its analysis. *Greenholtz*, at 12. In other words, before rejecting Petitioner's Petition out-of-hand, then analysis of Texas' statutory and regulatory scheme related to parole and mandatory supervision must be conducted. While the District Court does analyze Tex. Gov. Code §508.146, it only does so only to note that the provision states it is "discretionary." Appendix D. The court then cites this Court's decision in *Barker v. Owens*, 277 F. App'x 482, 2008 WL 1983782, at *1 (5th Cir. May 8, 2008) (per curiam). In *Barker*, this Court held:

> As the decision whether to release an inmate to MRIS is entirely within the Board's discretion, Barker has no constitutionally protected interest in release. See TEX. GOV'T CODE ANN.§ 508.146; *Allison v. Kyle*, 66 F.3d 71, 73-74 (1995). Barker's contention that the Board deviated from the procedural requirements of§ 508.146 does not allege a constitutional violation because the "[m]ere failure to accord the procedural protections called for by state law or regulation does not of itself amount to a denial of due process." *Giovanni v. Lynn*, 48 F.3d 908,912 (5th Cir. 1995).

While the *Barker* case may seem dispositive here, Petitioner respectfully submits that it is not because it ignores the guidance from the Supreme Court in *Greenholtz* to engage

in the type of statutory review of the Texas statutory scheme related to MRIS as it did with the Nebraska scheme in *Greenholtz*. See 442 U.S. at 12-16. While such a review would not be necessarily an extensive type that would have been done by a Texas court under a habeas review, it still must be done.

In addition, and of great importance, Texas has foreclosed any review of its MRIS process under the Texas Habeas Statute, Tex. Code Crim. Proc. *Anthony v. Owens*, et al, No-14-07-01077- CV, Tex. App, July 7, 2009; *Ex. Parte Johnson II*, 541 S.W.3d 827 (Tex. Crim. App. 2017) *Ex. Parte Johnny Leri Cole*, No WR-4-094-09, Tex. Crim. App, February 25, 2015. While the *Greenholtz* review would certainly not be as detailed as that done by a Texas state court, it still must be done by the federal court and there is no indication that the Fifth Circuit has done.

With respect to the relief provided to Petitioner by this Court, Petitioner asserts he should receive the same relief that the *Greenholtz* petitioners received, that is to say, "reversed and the case is remanded for further proceedings consistent with this opinion." *Greenholtz*, at 16.

The analysis of the Supreme Court in *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011) is also instructive in determining the type of inquiry that a District Court should do to determine if there is a conditional liberty interest invoked. *Swarthout* does state that the habeas statute as to a state prisoner only in violation of the constitution and laws of the

United States, citing *Wilson v. Corcoran*, 562 U.S. 1, 5, 131 S.Ct. 13, 16, 178 L.Ed.2d 276, 280 (2010) (per curiam). However, it then goes on to detail the due process analysis that is required:

> As for the Due Process Clause, standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient. *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). Here, the Ninth Circuit held that California law creates a liberty interest in parole, see 606 F.3d, at 1213. While we have no need to review that holding here, it is a reasonable application of our cases. See *Board of Pardons v. All*en, 482 U.S.369, 373-381, [131 S.Ct. 862] 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987); *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 12, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).
>
> Whatever liberty interest exists is, of course, a state interest created by California law. There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners. Id., at 7, 99 S.Ct. 2100, 60 L.Ed.2d 668. When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication-and federal courts will review the application of those constitutionally required procedures. In the context of parole, we have held that the procedures required are minimal. In *Greenholtz*, we found that a prisoner subject to a parole statute similar to California's received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied. Id., at 16, 99 S.Ct. 2100, 60 L.Ed.2d 668. " The Constitution, " we held, "does not require more." Ibid. Cooke and Clay received at least this amount of process: They were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons

> why parole was denied. 606 F.3d, at 1208–1212; App. to Pet. for Cert. 69a–80a; Cal. Penal Code Ann. §§3041, 3041.5 (West Supp. 2010).
> 562 U.S. at 220

The Swarthout process should have been done by the Fifth Circuit and District Court. It still needs to be done.

B. <u>There Are Procedural Requirements in The Texas MRIS Process</u>

It is necessary to examine the statutory procedures to determine whether they provide the process that is due, because, as quoted before, "[i]t is axiomatic that due process is 'flexible, and calls for such procedural protections as the particular situation demands.'" *Greenholtz*, 442 at 12. The issue in this case then depends on an examination of the statute and regulations. The District Court relies on *Manning v. Warden, Louisiana State Penitentiary*, 786 F.2d 710, 711 (5th Cir. 1986) for this "black letter" statement: "[t]he simple fact is that habeas corpus is available only for the vindication of rights existing under federal law; not rights existing solely under the rules of state procedure." Appendix D. However, Manning's situation was significantly different than Petitioner's. Manning claimed there was a misjoinder of cases under Louisiana law when he was tried. The Fifth Circuit held that any violation was a question of state criminal procedure. Then it stated the following important principle:

> When there has been a violation of state procedure, the proper inquiry "is to determine whether there has been a constitutional infraction of defendant's due process rights which would render the trial as a whole

'fundamentally unfair, (internal quotes omitted.) Id at 711-712

Therefore, under *Manning*, the mere fact that it is state law or procedure involved does not end the inquiry. It is necessary to see whether there is a "constitutional infraction of Petitioner's due process right. Just how this is done is shown in *Swarthout v. Cooke*, 562 U.S. 216, 20 (2011) because

> the Due Process Clause requires fair procedures for its vindication-and federal courts will review the application of those constitutionally required procedures.

At a minimum, Petitioner should have been allowed an opportunity to have the evidence he submitted in the MRIS heard and then he should have been provided a statement of the reasons why MRIS was denied, as was the case in *Greenholtz*. 442 U.S. at 16. Texas does have a parole statute, Chapter 508 Tex. Gov. Code. Petitioner does not argue that §508.146 requires "mandatory" release under an MRIS request. However, under *Swarthout,* a federal court can determine under federal habeas corpus whether there is a constitutionally adequate application of the state law such that a prisoner such as Petitioner has not been deprived of a constitutionally adequate procedure. There is evidence of this found in Section VIII, ¶¶ 28-49, pp. 16-28 of the Petition for Writ. Appendix J. And as set forth above, there has been no showing

of any procedure used at all despite the extensive request by Petitioner's counsel to obtain them. .

In addition, Tex. Gove. Code §508.146 does set out an extensive procedure for MRIS.

> 508.146. MEDICALLY RECOMMENDED INTENSIVE SUPERVISION. (a) An inmate other than an inmate who is serving a sentence of death or life without parole may be released on medically recommended intensive supervision on a date designated by a parole panel described by Subsection (e) . . .,
>
> (1) the Texas Correctional Office on Offenders with Medical or Mental Impairments, in cooperation with the Correctional Managed Health Care Committee, identifies the inmate as being:
>
> (A) a person who is elderly or terminally ill, a person with mental illness, an intellectual disability, or a physical disability, or a person who has a condition requiring long-term care, if the inmate is an inmate with an instant offense that is described in Article 42A.054, Code of Criminal Procedure; or
> (B) in a persistent vegetative state or being a person with an organic brain syndrome with significant to total mobility impairment, if the inmate is an inmate who has a reportable conviction or adjudication under Chapter 62, Code of Criminal Procedure

In other words, by statute for Petitioner to be eligible for MRIS, he must have an intellectual or physical disability, or require long-term care. Also, because he falls under Chapter 62 of the Texas Code of Criminal Procedure, he must have organic brain syndrome with significant to total mobility impairment. In order to make this determination, TDCJ has promulgated an 11-page guidance entitled TCOOMMI

Program Guidelines and Processes for Medically Recommended Intensive Supervision (MRIS) , PGP 01.04, Appendix H, as well as TDCJ Policy Manual A-086, Appendix I. These policy guidelines establish the MRIS framework that should be followed to assure Petitioner's liberty interest in due process, because if he is denied due process in this process, he is being denied a potential right to liberty. Petitioner asserts that, with respect to his individual situation, he has a liberty interest in the application of manuals of TDCJ with respect to MRIS, and particularly the right to require that the procedures be followed. The relevant provisions of §508.146 have been described above. The regulations will be laid out below.

The TDCJ TCOOMMI Program Guidelines and Processes for Medically Recommended Intensive Supervision (MRIS) , PGP 01.04 (Appendix H) sets out the purpose of the procedure:

> Subject:
>
> Medical Recommended Intensive Supervision process for offenders with significant illnesses sentenced to serve felony convictions in TDCJ-CID or State Jails, county jails, concurrent Texas convictions in other State Prisons, and concurrent Texas convictions in Federal Correctional Institutions (page I of Exhibit 6)

External referrals such as that submitted to TDCJ in Petitioner's MRIS application (Exhibit H of Appendix J0 is provided for:

C. External Referrals

> Upon receipt of written correspondence or telephonic referral requesting MRIS consideration, the offender's records will be reviewed for determination of eligibility.
>
> > If eligible, an E-mail will be sent, via EMR, to the unit medical staff requesting recommendation based on the offender's current condition
> > The unit medical staff will make recommendation for MRIS by forwarding the appropriate MRIS medical mental health summary (Page 2 of Appendix H)

There is also a "process" for MRIS II.

> MRIS Eligible Process
>
> > 1. Detainers will be reviewed on a case-by-case basis to determine further processing of eligible cases.
> >
> > 3. In coordination with unit staff, TCOOMMI will obtain a MRIS Agreement Form, signed by the offender, as well as a current photo of the offender for inclusion in the transmittal to the Board of Pardons (page 3 of Appendix H)

Since Petitioner has been unable to determine whether any of the provisions and steps were followed, and since neither the Fifth Circuit nor the District Court made any attempt to see if the provisions and the steps were followed, there is still a need for this to determine if his right to due process has been met or denied in accordance with *Swarthout*, and this Court is the only resort that Petition has to achieve this end required by justice

Policy Manual A-086, Appendix I, lays out specific determinations that should be made to determine Petitioner's eligibility for MRIS. As set forth in

Policy Manual A-08.6, there are nine medical conditions under A-08.6 that will qualify for MRIS. Petitioner should have the right to determine if he qualifies for several of the nine, which are (a) Elderly, (b) Physically handicapped; (c). Petitioner would qualify and deserves to have an assessment pursuant to pursuant to the Manuals.

Thus, There is a cognizable liberty interest in seeing that the Texas standards for MRIS have been met or a least considered and at least the minimum procedures adequate for due-process protection of that interest are those set forth in *Greenholtz*. In addition, there is a difference. Petitioner's case, MRIS goes beyond the "purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release." These determinations involve medical science and must be based upon established expertise of the medical personnel making the decision as well as the medical records that TDCJ TCOOMMI Program Guidelines and Processes for Medically Recommended Intensive Supervision (MRIS) , PGP 01.04 (Appendix I), states as part of the consideration of an outside referral, that the offender's records will be reviewed to determine eligibility for MRIS.

C. Petitioner Deserves At Least Discovery of What TDCJ Did

In accordance with Rule 6 of The Rules Governing Section 2254 Cases in The United States District Courts, Petitioner believes that certain discovery should be allowed in this case to determine what process was actually used. In

particular, there should be discovery to determine what processes were employed and what supporting documents are available for the unsuccessful efforts of Petitioner to obtain documentation that are set forth in the Petition for Writ set forth in Section VIII, Action by TDCJ Related to Request for MRIS found in ¶¶28-49 , pp. 19-31, Appendix J. In addition, other efforts subsequent to the filing of Petition for Writ were made to obtain documents, found in Petitioner's Motion Requesting Approval for Subpoenas file January 19, 2020. Appendix K.

IV. CONCLUSION

Certiorari should be granted because the holding of the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power as provided for in Rule 10. This matter should be remanded to the Fifth Circuit with a requirement that the due process analysis argued for above and embodied in the *Greenholtz* and *Swarthout* cases be followed and that the case be remanded from the Fifth Circuit to the District Court to allow the discovery to determine what if any procedure and evidence was relied upon by the TDCJ in making its determination to deny MRIS to Petitioner.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify that the accompanying Petition for Writ of Certiorari in Robles v. United States, No. 19-912 complies with the word count limitations of Supreme Court Rule 33(g) in that it contains 7934 words, based on the word-count function of Microsoft Word – Office 365, including footnotes and excluding material not required to be counted by Rule 33(d). It contains 34 countable pages.

_____

John E. Richards

CERTIFICATE OF SERVICE

I certify that on December 13, 2021 the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users or by email:

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