No. 23-6779

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID H. JACOB — PETITIONER
(Your Name)

vs.

ROSALYN COTTON, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

the U.S. Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAVID H. JACOB
(Your Name)

P.O. Box 22500
(Address)

Lincoln, NE 68542-2500
(City, State, Zip Code)

(none)
(Phone Number)

QUESTION(S) PRESENTED

Nebraska's parole procedures have been greatly altered since the U.S. Supreme Court found Nebraska statutes created a liberty interest in that 1979 decision: Greenholtz v. Inmates, 442 U.S. 1 (1979). The Greenholtz Court said:

> 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.
> Id. at 16

1. Do Nebraska's current parole procedures still meet the requirements of the 14th Amendment's Due Process clause under the test set out in Mathews v. Eldridge, 424 U.S. 319 (1976) and used by the Greenholtz Court?

Subsidiary questions fairly included; Rule 14.1(a):

2. In the liberty interest in parole context, does "the opportunity to be heard" no longer guarantee "notice and a meaningful opportunity to rebut" the evidence the Parole Board relies upon for its' decision?

3. Does it now require a state statutory right to parole to have a liberty interest in parole procedures that the 14th Amendment's Due Process clause will guarantee?

LIST OF PARTIES

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

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Rosalyn Cotton, Chairperson, Nebraska Board of Parole
Mark T. Langan, Member, Nebraska Board of Parole
Robert Twiss, Member, Nebraska Board of Parole
Layne Gissler, Member, Nebraska Board of Parole
Virgil J. Patlan, Member, Nebraska Board of Parole

RELATED CASES

Jacob v. Cotton, et al., 4:20CV3107 (D.Neb. 2021) 2020 WL 130953

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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

[X] 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,
[X] 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,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

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

The opinion of the _____ court appears at Appendix _____ to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was 10/6/2023.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 11/14/2023, 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

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ....

Amendment XIV, Section 1, U.S. Constitution

Neb.Rev.Stat. §83-1,111(1)(Reissue 1976): Appendix D-1 to D-2

Neb.Rev.Stat. §83-1,111(1)(Reissue 2008): Appendix D-3 to D-4

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Neb.Rev.Stat. §83-1,125.01(1)&(2)(2018): Appendix D-9 to D-10

Neb.Rev.Stat. §83-962(2018): Appendix D-11 to D-12

STATEMENT OF THE CASE

In 1986 the Petitioner and another person caused the deaths of three persons in a single event. The Petitioner was convicted of three counts of second degree murder and two counts of using a firearm for this event. This is the Petitioner's only criminal offense.

Petitioner became eligible for parole in 2015 and has had annual "reviews" since then. Each year the Board of Parole has deferred the Petitioner's parole using the reason found in Neb.Rev. Stat. §83-1,114(1)(b) [Appendix D, p.D-6]. The Board's Notice says:

> The nature/circumstances of your offense(s) indicates that an early release would depreciate from the seriousness of your crime and promote disrespect for the law.

Beginning in 2020 the Board would no longer be able to use this reason because the Correctional System Overcrowding Emergency Act (CSOE); Neb.Rev.Stat. §83-962(3) [Appendix D, p.D-11]; would take effect and replace the standards in Neb.Rev.Stat. §83-1,114 (1)(a)-(d) [Appendix D, p.D-6].

Most of Nebraska's parole procedures have changed greatly since the time of the Greenholtz decision. In 2019 the Petitioner received a pass to his "review" scheduled for that afternoon. Under the current "review" procedure an offender does not have prior notice of the date the "review" will be held, they simply receive a pass under the door of their cell the morning of the "review." This is unchanged; see, Greenholtz v. Inmates, 442 U.S. 1, 14 n.6. But other procedures are significantly different.

The Board can no longer allow offenders access to their files; see Id. at 15 n.7. Neb.Rev.Stat. §83-1,125.01(2) now makes the files confidential and forbids offender access to it [Appendix D, p.D-10]. Factual errors by the Board could be challenged in Petition in Error proceedings under Neb.Rev.Stat. §25-1901; see, Id. at 5 n.2. This is no longer true; Ditter v. Board of Parole, 11 Neb.App. 473, 655 N.W.2d 43, 50 (Neb.App. 2002); and is a consequence of separating "reviews" from "hearings". Where in 1979 Neb.Rev.Stat. §83-1,111 had provided "initial review hearings" and "final parole hearings"; see, Greenholtz, supra at 4-5; today's statute only provides eligible offenders with "reviews" until the decision to parole is made and only then is a "hearing" provided. See the change to Neb.Rev.Stat. §83-1,111(1976)[Appendix D, p.D-1] and currently in [Appendix D, p.D-3]. Today a parole eligible offender has no means of challenging or rebutting the Board's factual findings until the Board decides to parole that offender. Neb.Rev.Stat. §83-1,112 limits files only to "hearings."

In the Petitioner's 2019 review the Board (admitted they) only discussed the Petitioner's current offense. [Appendix B, p.9 ¶18]. The Petitioner is a first-time offender, he has no prior criminal convictions. As is the current procedure, the Petitioner was not told the Board's decision or reasoning in the review proceeding. Petitioner received the Board's "Notice" when it was slipped under his cell door the following day. The Petitioner's 2019 Board Review Notice once again used the "nature

and circumstances" reason to defer parole, but for the first time ever now included: "Due to your prior criminal record." [Appendix B, p.9 ¶21].

Knowing the Board would not be able to use the "nature and circumstances" reason in the next years (2020) review under the CSOE, the Petitioner assumed the Board was trying to fabricate a reason to defer his parole in 2020. The CSOE; Neb.Rev.Stat. §83-962(3)(a) [Appendix D, p.D-11 to D-12]; provides the Board can defer parole when:

> (a) the board has determined that it is more likely than not that the offender will not conform to the conditions of parole.

Then §83-962(4) provides that:

> (4) In making the determination regarding the risk that a committed offender will not conform to the conditions of parole, the Board shall take into account the factors set forth in subsection (2) of Section 83-1,114.

This would include the "prior criminal record" recited in Neb.Rev. Stat. §83-1,114(2)(j) [Appendix D, p.D-7]. Therefore, beginning in 2020 a "prior criminal record" could be a reason to defer parole under the CSOE. Note that Neb.Rev.Stat. §83-1,114(2) [Appendix D, p.D-6 to D-7] does NOT limit the Board to ONLY those factors listed; yet the Board claims in their defense that they MUST consider the Petitioner's current offense as a "prior criminal record" or they could not consider the nature and circumstances of the current crime; something specifically removed from the CSOE by the Legislature.

Petitioner filed suit, pro se, in the Federal District Court

under 42 U.S.C. §1983 because he had no idea where this "prior criminal record" appeared from. The Petition claimed the Board's 2019 decision was arbitrary and erroneous, that the liberty interest in Nebraska's parole procedures had been violated by the Board, and that the current parole procedures violate the 14th Amendment's guarantee of Due Process as decided by the Greenholtz Court. The Petition sought declaratory judgments and a new parole "hearing."

The District Court's initial review resulted in a dismissal by finding, based upon Sandin v. Conner, 515 U.S. 472 (1995), that Nebraska's parole statutes did not create a liberty interest protected by the Due Process clause. See, Jacob v. Cotton, 4:20 CV3107, 2021 WL 130953, p.3. A Motion to Alter or Amend was necessary to correcting this direct contradiction of the Greenholtz ruling. In discovery the Respondent Board members admitted the Petitioner's only criminal conviction is the one he is now serving [Appendix B, p.7 ¶9 & p.8 ¶10].

Respondents filed a Motion for Summary Judgment based on (1) their claim that Neb.Rev.Stat. §83-1,114(2) required the Board to consider the Petitioner's (only) criminal conviction to be a "prior criminal record" or they would not be able to consider the nature and circumstances of that current offense, (2) that the Petitioner's presence in the review proceeding provided him with an opportunity to be heard, and (3) providing the Petitioner with the Notice of their decision met all the necessary requirements of Due Process.

The District Court granted Summary Judgment to the Respondents by (1) deferring to the Board's construction of Neb.Rev.Stat. §83-1,114(2) to require the current conviction to be a part of a "prior criminal record" (and misrepresenting the Petitioner's argument)[Appendix B, pp.13-14], (2) erroneously found the Petitioner had access to his records [Appendix B, pp.11-2], contrary to the statutory prohibition against offender access in Neb.Rev. State. §83-1,125.01 [Appendix D, pp.D-9 to D-10], and (3) relying upon a quotation from the Greenholtz decision that says:

> 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 the circumstances. The Constitution does not require more.
> Greenholtz, supra, at 16

Compare [Appendix B, pp.1 & 13 reciting to Greenholtz, supra, 442 U.S. at 16]. The District Court held that having been present at the review proceeding provided the Petitioner the "opportunity to be heard" and the Board's Notice provided all the process that was due, "the Constitution does not require more." [Appendix B, p.13].

The District Court failed to follow the holding in Mathews v. Eldridge, 424 U.S. 39 (1976) as the Greenholtz Court did (442 U.S. at 13-14), And did not examine whether the procedures currently followed in Nebraska were adequate to prevent arbitrary or erroneous deprivations of a liberty interest.

The Eighth Circuit Court of Appeals found the District Court's summary judgment was proper without any further discussion or

or consideration of Mathews v. Eldridge, or the Greenholtz decision.

REASONS FOR GRANTING THE PETITION

The Petition should be granted because the Court of Appeals' judgment, to accept the District Court's decision, on an important question of Federal law conflicts with relevant decisions of this Court and this conflict should be settled by this Court. (Rule 10(c)). In addition, the Court of Appeals' judgment deals with an important question of Federal law in a way that conflicts with a decision by a state court of last resort and other U.S. Courts of Appeals. (Rule 10(a)).

The Federal Courts in the Eighth Circuit are trying to eliminate the liberty interest in Nebraska's parole proceedings as decided by the Greenholtz Court in favor of the liberty interest definition from Sandin v. Conner, 515 U.S. 472 (1995). The Greenholtz Court found a liberty interest in state statutes that created a "reasonable expectation" of release on parole; Greenholtz, supra at 12. Applying the "atypical and significant hardship" standard from Sandin the Eighth Circuit now finds a liberty interest in parole only where there is a statutory right to parole. The District Court's initial dismissal of this case (2021 WL 130953) is an example of this incorrect opinion.

The Eighth Circuit Court of Appeals decision that shows this is Jenner v. Nikolas, 828 F.3d 713, 717 (8th Cir. 2016)(citing Sandin) where South Dakota statutes provided a right to a parole

hearing but the Court decided there was no liberty interest without a statutory right to parole. That is not just my reading of the Jenner decision, that is the Utah Supreme Court's understanding and conflict with the Eighth Circuit. In Neese v. Utah Board of Pardons and Paroles, 416 P.3d 663 (Utah S.Ct. 2017) the Court stated that the Jenner decision showed the conflict between Sandin and Greenholtz.

> "Sandin doesn't change the rule that absent a statutory right to parole there's no 'protected libert interest' for the purposes of the Due Process Clause."
> Neese, supra, at 675, citing to Jenner, supra, at 717.

The Neese Court recites: McQuillion v. Duncan, 306 F.3d 895, 903 (9th Cir. 2002)("Sandin does not deal with a prisoner's liberty interest in parole and does not overrule Greenholtz and Allen." (citing Ellis v. District of Columbia, 84 F.3d 1413, 1417-8(D.C. Cir. 1996))); Ellis, 84 F.3d at 1418("Until the Court instructs us otherwise, we must follow Greenholtz and Allen because, unlike Sandin, they are directly on point. Both cases deal with a prisoner's liberty interest in parole; Sandin does not. ....)

Other Federal Circuits have also decided that Sandin is NOT about parole; see, Michael v. Ghee, 498 F.3d 372, 378 (6th Cir. 2007); McQuillion v. Duncan, supra (9th Cir. 2002); and Ellis v. District of Columbia, supra (D.C.Cir. 1996).

The Ellis Court stated this split succinctly: "Where the Supreme Court stands on this subject is no longer certain." 84 F.3d at 1417.

Nebraska did not eliminate the liberty interest in parole simply by replacing "hearings" with only "review" proceedings. The procedures provided do not create the liberty interest, Neb. Rev.Stat. §83-1,114(1) does; Greenholtz, supra, at 11-12. Once a liberty interest is established the procedures must be examined for adequacy to meet the requirements of Due Process. That adequacy is measured by the three factors set out in Mathews v. Eldridge, supra.

The Court of Appeals through the District Court below failed to apply the Mathews decision factors (Mathews, supra, at 335) because they don't think a liberty interest exists. These Courts, had they first accepted that a liberty interest exists (the first Mathews factor), should have examined the risk of an erroneous deprivation of that liberty interest through the procedures used (the second Mathews factor) compared to the probable value of the 1979 procedures the Greenholtz Court found. But the District Court and the Court of Appeals don't believe that a liberty interest exists in the "review" procedure; only in a "hearing." For them no hearing means no liberty interest means no Mathews analysis of the current procedures. The Board does not grant a liberty interest by holding a "hearing," the liberty interest is created by the statute that creates the "reasonable expectation" of parole and should apply to every procedure the Board follows. The failure to apply Mathews shows the conflict between Greenholtz and the Court of Appeals and District Court's decision.

The Greenholtz cited to 4 significant procedures. An offender's access to his records prior to the hearing; Greenholtz, supra, at 15 n.7. The opportunity to be heard in the hearing; Greenholtz, supra, at 4 n.1. Notice of the Board decision; Greenholtz, supra, at 15. Judicial review of the Board's fact-finding errors in a Petition in Error (Neb.Rev.Stat. §25-1901); Greenholtz, supra, at 5 n.2.

This Court in Swarthout v. Cooke, 562 U.S. 216 (2011), found the same 4 procedures in the liberty interest in parole context, even without citing to Mathews v. Eldridge. Inmates had access to their records in advance of hearings; Swarthout, supra at 220. They had an opportunity to be heard in the hearings; Swartout, supra, at 220. Notice of the Board's reasons; Swarthout, supra, at 220. Judicial review of the Board's and the Governor's decision in state habeas corpus proceedings; Swarthout, supra, at 217.

Even outside the parole context this Court has found the same 4 procedures for a liberty interest. In Wilkinson v. Austin, 545 U.S. 209 (2005) the Court found a liberty interest for Ohio inmates avoiding assignment to a supermax facility. The Court found: (1) prior notice of the factual basis, (2) a fair opportunity for rebuttal (the opportunity to be heard), (3) notice of the officials' decision, and (4) a second opportunity for review; Wilkinson, supra, at 225-6. Most significantly is the Court's holding that an "opportunity to be heard" means a rebuttal opportunity. Id.

Today, Nebraska provides the Petitioner and all other eligible offenders NO access to their files (Neb.Rev.Stat. §83-1, 125.01(2)) and NO notice of the factual basis for their decision prior to the "review" and, thus, NO opportunity to rebut their findings (No one said anything about a "prior criminal record" in the Petitioner's review). Separating "reviews" from "hearings" has eliminated any opportunity for correcting errors by the Board; Ditter v. Board of Parole, supra, eliminating the Petition in Error (Neb.Rev.Stat. §25-1901) for "reviews."

Today, Nebraska's parole procedures are no longer adequate to guarantee Due Process. The Court should grant the writ to correctly enforce the Due Process guarantee of the 14th Amendment and settle the split on whether Sandin or Greenholtz defines a liberty interest in the parole context.

I also point out that this case may be in conflict with another case currently before the U.S. Supreme Court; Lopez Bright Enterprises v. Gina Raimondo, Sec. of Commerce, Case No. 23-451. The District Court below and the Court of Appeals have both given deference to the executive branch state agency's, the Board of Parole's, interpretation of a state statute to justify their action. The Board interprets Neb.Rev.Stat. §83-1,114(2)(j) as requiring an offender's current conviction to be a part of a "prior criminal record". The lower Court's (Chevron) deference to the agency's interpretation is in conflict with Nebraska's

rules of statutory construction which do not allow the statutory word "prior" to be rendered meaningless; State v. McColery, 301 Neb 516, 522 (Neb. 2018); i.e., that every conviction should be a "prior" conviction and part of a "prior criminal record." Should this Court decide against Chevron deference and in favor of a Court's application of the rules of statutory construction, the Petitioner's case would be an example where a different result should have occurred.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David H. Jacob, pro se #37269

Date: February 5th, 2024