In the

Supreme Court of the United States

Ewell Scott, etc.,

Petitioner,

v.

Kentucky Parole Board, et al.,

Respondents.

No. 74-6438

Washington, D. C.
October 12, 1976

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Washington, D. C.,

Tuesday, October 12, 1976.

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DEAN HILL RIVKIN, ESQ., Appalachian Research and Defense Fund of Kentucky, Inc., 630 Maxwelton Court, Lexington, Kentucky 40508; on behalf of the Petitioner.

PATRICK B. KIMBERLIN, III, ESQ., Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 74-6438, Scott against Kentucky.

Mr. Rivkin, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF DEAN HILL RIVKIN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. RIVKIN: Thank you.

Mr. Chief Justice, may it please the Court:

This case is here on a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, which rejected a claim by Kentucky prisoners that the State Parole Board be required to abide by the minimum guarantee of procedural due process in determining whether or not to release prisoners on parole.

Specifically, the issue is twofold.

First, whether the decision to grant or deny parole implicates an interest in liberty protected by the due process clause of the Fourteenth Amendment; and

Secondly, if the parole function is accorded constitutional protection, what are the minimum safeguards that apply?

Before addressing these questions, I will discuss briefly the threshold question of mootness, which consideration has been deferred until this hearing.

The State has suggested that the release on parole of the named petitioner has mooted this action. It is our position that this occurrence has not deprived this action of the necessary adversariness or the present vitality under Article 3.

Three grounds support our view.

First, we believe that this is a case capable of repetition between the parties, yet evading the plenary review of this Court.

QUESTION: How do you explain Weinstein v. Bradford on that basis?

MR. RIVKIN: In this case, Your Honor, the petitioner Scott is on parole until 1984. He is also required to abide by a number of stringent conditions on his liberty. In Bradford, the petitioner was totally released from any restrictions by the State on parole.

QUESTION: But he was on parole, was he not?

MR. RIVKIN: He -- when the case was here and the decision was rendered mooting the case, the petitioner Bradford was off parole. There was no --

QUESTION: He had served his full time and wasn't even subject to parole?

MR. RIVKIN: Yes. He had served his full sentence, that's right.

Secondly, this is a paradox of a case which has evaded

the plenary review of this Court.

QUESTION: Well, Mr. Rivkin, one other question, if I may.

MR. RIVKIN: Yes.

QUESTION: If,now being on parole, his parole is sought to be revoked, he would get a Morrissey type hearing, would he not, on this?

MR. RIVKIN: Yes, he would, Your Honor. Yes, he would. That's right.

But he would be returned --

QUESTION: That's because he now has a conditional liberty outside the walls of the institution.

MR. RIVKIN: Under the terms of Morrissey, that's right. He would be returned to the institution, however, and would likely be eligible for parole after a number of years again. As I say, his parole lasts until 1984.

Secondly, --

QUESTION: His sentence, you mean, lasts until 1984.

MR. RIVKIN: His sentence, that's right. Excuse me.

Secondly, this is a case which has evaded the plenary review of this Court in three other instances: In Scarpa vs. Board of Parole; Johnson vs. New York Board of Parole; and Bradford vs. Weinstein.

The precise issue presented here has been mooted.

QUESTION: Well, those aren't two separate grounds;

together they are one ground, are they not?

MR. RIVKIN: That is right. They are one of our three grounds, Your Honor.

QUESTION: That is, capable of repetition yet evading review?

MR. RIVKIN: That's right. That's right. That's --

QUESTION: Up to now you have just spoken about those --

MR. RIVKIN: Those are the two prongs of our first ground, yes.

QUESTION: Right.

MR. RIVKIN: Secondly, we believe that this case should be treated and maintained as a class action. It was commenced as a class action, but the district court did not permit the complaint to be filed in forma pauperis, and dismissed the case, although it never was officially filed with the court.

It only became a formal case with a number when the United States Court of Appeals for the Sixth Circuit granted the motion to proceed in forma pauperis.

We believe that the district judge, in essence, precluded our moving for certification in this case.

Secondly, there's no question that there's a live controversy here between the members of the class, the purported class, the prisoners of Kentucky, and the Parole Board.

Finally, under the intention of Rule 23, there are a number of lower court cases supporting the proposition that the justiciability of a case is not affected when the named petitioner, or the named plaintiff is mooted, or the situation of the named plaintiff is mooted.

QUESTION: That is, if it is a class action?

MR. RIVKIN: If -- regardless of formal certification, these cases hold, and they permit intervention. And that is my third point.

We have made a motion to substitute named petitioners here, and, in the alternative, to intervene. And we believe that in the interests of judicial economy and in the important interest of resolving this issue which has come to this Court four times, --

QUESTION: Did you do that in the Court of Appeals?

MR. RIVKIN: No. In the Court of Appeals, the named petitioner Scott was still in prison, he had not been paroled yet.

QUESTION: And did you move to have it certified as a class action?

MR. RIVKIN: No, we did not move that in the Court of Appeals.

QUESTION: You could have had intervention in the Court of Appeals without any problem.

MR. RIVKIN: There was no necessity to have it then,

Your Honor. The petitioner Scott was on -- was in prison.

QUESTION: I think I read in your brief that you had hundreds of these guys were clamoring at your doorsill. Why didn't you put some more of them in there?

MR. RIVKIN: At the --

QUESTION: You know, just as a precaution.

MR. RIVKIN: At the initiation of this --

QUESTION: If you put enough in there, they wouldn't have paroled all of them.

[Laughter.]

MR. RIVKIN: I would like to think so, Your Honor.

QUESTION: Well, why didn't you?

MR. RIVKIN: We chose, out of ten or twelve individuals, we chose two whose stateements seemed to us representative or most representative of the class, with the best factual situation.

In retrospect, perhaps we should have included a large number.

QUESTION: I guess you couldn't make it -- the Court of Appeals could not have certified it, even if you had asked them.

MR. RIVKIN: I don't think so, YOur Honor. At the time, it was a live controversy. There was no question about mootness in the Court of Appeals.

The only question came here.

QUESTION: Well, I understand. You don't certify because of mootness.

MR. RIVKIN: The certification of the class, I believe, would have dispelled any mootness question.

QUESTION: And I mean if you had asked for the certification in the Court of Appeals, my question is: Could the Court of Appeals certify?

MR. RIVKIN: I believe they could have. But we found no reason to, I'm afraid.

The case was a live controversy. Scott was in prison. And there was just no necessity to do that.

QUESTION: Well, then, I misunderstood you. You said in the trial court you didn't have a chance to have it certified.

MR. RIVKIN: That's right. That's right.

QUESTION: So you --

MR. RIVKIN: We would have moved for a Rule 23 certification.

QUESTION: Well, the question is not -- you didn't in the Court of Appeals.

MR. RIVKIN: We did not, no. And I'm not sure whether the Court of Appeals --

QUESTION: Could have.

MR. RIVKIN: -- could have done it at all under the Federal Rules.

QUESTION: The Court of Appeals mentioned in passing, or in describing the case, as I recall, that it was a class action.

MR. RIVKIN: That's right. So did the district judge, Your Honor, and I think they, in fact, treated it as a class action.

Turning to the merits, the initial inquiry, as established by the cases, is into the nature of the interest at stake in the parole decision.

An understanding of the paroling process will show that this interest has ample substance to be embraced within the concept of liberty protected by the due process clause of the Fourteenth Amendment.

Parole is a statutory creation of the State, and it is an integral part of the sentencing apparatus of the State. When an individual is sentenced, it is contemplated by the Legislature, by the sentencing judge, by prison administrators, and by the Parole Board that most prisoners will spend part of their time in incarceration and part of their time on the streets, on parole.

Among the critical decisions made about an individual involved in the criminal justice system, the parole decision is one of the most important. From arrest to conviction to sentencing to in-prison deprivations to parole revocation, one of the major concerns of the system is the length of incarcera-

tion that an individual will serve.

This concern is magnified in the parole decision, which, unlike the other decision points that I have mentioned, is not accorded constitutional protection or due process protection of any kind.

This conception of parole, as an integral part of the system of government decision-making, determining the length of incarceration of an individual, is often obscured by another notion of parole as simply another form of correctional treatment that is left to the unbridled discretion of experts who primarily are involved in predicting recidivism.

However common this conception was in days when parole was considered charity or a gift or grace, it has not and cannot withstand present-day scrutiny.

QUESTION: Do you agree that the State could -- a State Legislature could simply abandon parole systems entirely?

MR. RIVKIN: Yes, I do. If a State abandons a parole system and modifies its sentencing system, which it would have to do, this case would not be here.

This case does not involve the constitutional rights of parole, but only fair consideration in the process of determining parole.

Today it is commonly accepted that the parole decision is based on a variety of factors, unrelated to the predictive ability of the board. Some of these considerations are the

past history of an individual, the offense the individual committed, the person's institutional record, the prison population capacities in the particular State, and others.

To the extent that these factors enter the parole decision, which they most certainly do, the absolute claim of expertise suggested by the State on behalf of the Board carries less force.

Our opponents probably would concede that a variety of factors enter into the decision-making process of the Board, but they claim that the Board has unfettered discretion to weigh these factors in any fashion that they will.

I think a look at the Kentucky system will reveal that the Board's discretion is not as uncabined as the State suggests.

Kentucky has created a scheme of conditional release where prisoners spend part of their time in prison and part of their time outside on conditional release.

This system is administered by a Board composed of professional decision-makers, who make upwards of 1,000 decisions per year.

Although this Board is within the State Department of Corrections, and relies on the STate Department of Corrections for information, it is a statutory creature of its own within the sentencing apparatus, and contemplated to be within the sentencing apparatus of the State.

By statute, the Board is required to abide by

certain ground rules which evidenced the Legislature's concern, the Kentucky Legislature's concern with fair and complete consideration in the parole process.

The Board is required, mandated by statute, to amass a good deal of information on an individual, and it's allowed to call on the resources of the Department of Corrections, the State Police, and others, to gather this information.

Secondly, the Board is required by statute to study the case history or the record of the individual.

Thirdly, the Board is required to deliberate on that record; and

Fourth, to conduct a hearing, which it does, often lasting five to ten minutes at the most.

Fifth, because the Board is composed of five members, it is also required to engage in some sort of collegial decision-making. It's not one individual --

QUESTION: On the hearing, who attends the five or ten-minute hearing?

MR. RIVKIN: The hearing is attended by normally all members of the Parole Board and the prisoner.

QUESTION: That's all?

MR. RIVKIN: That's all, yes.

Finally, the Board has been requested by the Legislature, or mandated by the Legislature to promulgate regulations governing the phases of its operation, I believe

the statute says, in accordance with prevailing ideas of correction and reform.

QUESTION: Could the Legislature provide for no hearing, if they wanted to? That is, no presence of the prisoner. Do you think that --

MR. RIVKIN: That exists in, I think, three States: Georgia, North Carolina, and one other State. There is no hearing at all required.

The hearing here, of course, is rather short and what goes on inside, nobody is really quite sure.

But if a Legislature wants to do that -- we don't think that that comports with minimum due process, of course, if a Legislature wanted to do that. We believe the hearing is an integral element of the process that is due.

QUESTION: Defined how? Hearing defined how?

MR. RIVKIN: A meaningful hearing, a hearing in which the individual is given an opportunity to present evidence, a statement, meeting whatever adverse evidence is in the file against the individual, very often there may be, for instance, letters from people in the community who this person, the prisoner, has no idea of who they are or why they're writing these letters.

This chance to have a meaningful opportunity to meet this evidence is one of the ingredients of the hearing that we

are requesting.

QUESTION: What about assistance?

MR. RIVKIN: We believe that assistance by an advocate, whether an attorney or a lay advocate, would be essential. The federal system allows a person's minister, a person's spouse, a person's -- member of the person's family to come in. This hearing is structured, and we believe it can be structured, to provide for a short presentation; and, according to some of the preliminary data that's coming out of those hearings, the assistance of an advocate is quite helpful.

QUESTION: And would you allow prior access to the letters?

MR. RIVKIN: We believe -- we also believe that that's one of the ingredients of due process.

One of the --

QUESTION: Before the actual hearing?

MR. RIVKIN: Before the actual hearing.

Once again, this is also provided by the U. S. Board of Parole. And this meets the substantial documentation of the errors that are contained in parole files. In fact, the Kentucky Parole Board was recently scrutinized by a blue ribbon commission, commissioned by the Governor of Kentucky, and they found the filekeeping sloppy, and they found mistakes, and they criticized it quite severely.

And, for this reason, we believe that access to the

file is important.

It would not provide much hardship for the State to do that, either, since there are two files, as I understand it, maintained. One at the prison where the individual lives, and one in the Central Office where the Parole Board meets.

QUESTION: Mr. Rivkin, your brief, I notice, was filed before this Court's decision in Meachum v. Fano. Are you going to discuss the application of that case to your contention?

MR. RIVKIN: I plan to, Your Honor, yes.

QUESTION: But your oral submission here, in answer to the questions of the Chief Justice and of Mr. Justice Brennan, have not deviated from your brief, as I understand, Specifically II B 1, 2, 3 and 4, the last 20 pages of your brief. Those are the four --

MR. RIVKIN: That's right. Those are the criteria that we believe are required in the process, yes.

QUESTION: Right. That's what I thought.

MR. RIVKIN: That's right.

In terms of channeling the discretion of the Board, the Board itself has promulgated 15 criteria that it says it looks at. The Board has also built up a body of precedents in the numbers, the vast numbers, of decisions that they make each year.

As I say, these are professional decision-makers.

They make decisions according to precedents and criteria. They have listed the 15 criteria, and we believe that if an individual prisoner and his or her record makes an adequate showing before this Board, that parole will likely ensue.

Finally, the statistics, nationwide and in Kentucky, show that most individuals are paroled. This underscores the importance, indeed the necessity of parole in the sentencing apparatus of a State, and demonstrates that a prisoner will in fact be paroled upon an adequate showing under the criteria that the Board considers.

The notion that the Board has unlimited discretion and could not, for instance, parole any prisoner, just does not comport with the reality of the system.

QUESTION: And this part of your argument, to the extent we have allowed you to make it, is directed to the claim that liberty is involved?

MR. RIVKIN: That's right. That's right, Your Honor, it's directed --

QUESTION: Well, let's assume that you have persuaded us that liberty is involved, you've got to do a little more than that, don't you, under the language of the Fourteenth Amendment? There has to be a deprivation of liberty without due process of law.

MR. RIVKIN: Well, we think that the notion of deprivation in this instance is met, both under the cases of

this Court and the realities of the system.

Under the cases of this Court, the notion that a person must be vested and therefore deprived of a right has not found total voice. Only last term, in the Hampton case, Hampton vs. Mow Sun Wong, the alien Civil Service case, the Court clothed individuals who were seeking federal jobs with the mantle of due process protection.

Similarly, in Willner vs. Board of Bar Examiners, and Schware vs. Board of Bar Examiners, and Goldsmith vs. Board of Tax Appeals, the Court did not make the distinction between an individual who has and possesses a benefit and one who is only applying.

And, in fact, in the amicus brief filed by the Solicitor General, in his footnote 23, he seems to concede that an applicant for benefits -- and he mentions unemployment compensation benefits -- that an applicant for those benefits will in fact be clothed with due process protection.

Under the realities of the system, if an individual is not paroled, based on, perhaps, erroneous information in the file, or illegitimate criteria, as is contemplated under the sentencing apparatus and by the sentencing judge, every day that that person stays in parole he or she is being deprived of an interest in liberty.

And as the --

QUESTION: You say illegitimate criteria, isn't --

under Kentucky law the decision of the Board is final?

MR. RIVKIN: There is review available in the Kentucky courts. There have been a couple of decisions in the Sixties by the high court in Kentucky, indicating that the court would review the parole decision on an abuse of discretion standard. They have never reviewed one successfully on behalf of a prisoner, but my understanding of those cases is that if, for instance, an individual were not paroled and could show that it was done on a racially illegitimate basis, the Kentucky court would review.

Otherwise, the discretion is rather broad, though.

QUESTION: To that extent, then, the State has set up some system within its own jurisdiction for correcting illegitimate -- what you call the use of illegitimate criteria?

MR. RIVKIN: The Court has indicated on one occasion that it would review for abuse of discretion. However, I should -- as I noted, it has never successfully reviewed one, first of all. Secondly, I think it shows that the court recognizes that there is a palpable interest here, by -- the very fact of judicial review indicates that there is something here, not the ephemeral kind of interest that the State suggests, but something quite important and to be protected.

QUESTION: Did the State court put it on a Federal constitutional ground?

MR. RIVKIN: No, no. It was solely on -- it's

sounded in administrative law in the State of Kentucky.

QUESTION: A State law question, then?

MR. RIVKIN: Yes. Yes. There is only one decision that I could find like that, and in that decision, of course, the court did talk about the parole as grace, it was a pre-Morrissey decision, and that was the only decision I have been able to find on that point.

But I think the existence of review is a recognition by the State courts of Kentucky that parole is a substantial interest. That is, --

QUESTION: Where you say parole as grace, and then you speak about it as a pre-Morrissey decision, certainly Morrissey didn't hold that parole was not a matter of grace, did it?

MR. RIVKIN: No. Morrissey rejected the characterization of parole as grace.

QUESTION: I wouldn't have thought so. I thought the idea was that if you're once granted parole, and you are in fact free from supervision, then if that's to be revoked, you are entitled to a hearing.

MR. RIVKIN: That's right. That was the holding of Morrissey. I think --

QUESTION: Well, that simile doesn't hold that parole -- the granting or denial of parole is not a matter of grace.

MR. RIVKIN: It's a matter of discretion, I think more properly characterizes it. The notion of grace, I think, goes into the notion of parole as a privilege which the court rejected, in Morrissey.

The characterization of the process as a privilege.

QUESTION: Well now, why do you say the court rejected that in Morrissey?

MR. RIVKIN: I believe it explicitly said that "we reject the characterization of parole as either a right or a privilege, and we will look on it as liberty that is valuable to be protected under the Fourteenth Amendment."

QUESTION: Well, that's parole once granted.

MR. RIVKIN: That is --

QUESTION: That's a revocation of parole.

QUESTION: No, but --

MR. RIVKIN: Right. That is --

QUESTION: -- Morrissey was talking about a revocation of an existing liberty status. You're now asking to push that further and say that before the State has ever granted that liberty, you nonetheless have a liberty interest.

MR. RIVKIN: That's right, and I think Your Honor's question fits in directly with Mr. Justice Stewart's question concerning whether an applicant for a benefit, as opposed to one who retains a benefit, is entitled to due process protection. And I believe, under the cases of this Court, as well as under

the notion that an individual who is not paroled could conceivably be -- characterized as being deprived of his or her liberty, if parole is not granted as contemplated under the system. That, for those reasons, we believe that the application of parole falls under due process protection.

QUESTION: Mr. Rivkin, your brief, I think, includes the statistics on the percentage of applications for parole that are actually granted in Kentucky?

MR. RIVKIN: That's right. There are 60 percent of the individuals who are in prison are relased on parole, and of those 60 percent, 68 percent are paroled the first time they appear before the Board. And those are statistics from '72 to '74, approximately.

QUESTION: Thank you, that's what I wanted.

MR. RIVKIN: With parole viewed in the context above, the nature of the interest at stake becomes apparent. It is not an ephemeral, unilateral interest or desire, but, rather, a claim to freedom legitimized by the Legislature, by the sentencing apparatus, by prison administrators, and by the Parole Board itself.

To characterize parole as nothing more than a mere hope or anticipation misconceives the dynamics of the system and the understandings that shape it.

The Court has recognized the palpability of a prisoner's interest in Morrissey vs. Brewer. I think that it's

interesting to note that in Morrissey vs. Brewer the decision-making process that goes on in revocation is very similar to, if not exactly similar to, the decision-making process that goes on in parole and release.

First, as the Court's opinion noted, the Board ascertains certain facts about the individual.

QUESTION: Which hearing are you talking about? The hearing on the ground, at the scene, or the hearing back at the institution?

MR. RIVKIN: The hearing back at the institution, the second hearing.

QUESTION: Well, --

MR. RIVKIN: The Board first must ascertain certain facts, just as it does in parole release.

Second, and as the Court noted, the more complex decision and the discretionary decision is the decision as to whether those facts justify, in that instance, returning the individual to prison; in our instance, whether the person should be released on the street.

And it's that discretionary decision and the discretionary decision-making that adheres in both of those processes that are the same.

QUESTION: But by the time he has that hearing, at the time he has the second hearing back at the institution and under Morrissey, he still is in a conditional liberty stage,

is he not? His parole has not yet been revoked.

MR. RIVKIN: The prisoner, I believe, normally would be incarcerated during that period.

QUESTION: Yes, but it has not been revoked.

MR. RIVKIN: That's right.

QUESTION: He is incarcerated in the same sense a person is incarcerated when he is arrested, before he is charged.

MR. RIVKIN: That's right. It has not formally been revoked until the Board does so at the second final hearing. That's not this case, of course.

Following Morrissey, a number of the -- a majority of the Courts of Appeals have upheld the position that we urge today, cognizant of the evoling approach to due process contained in some of the more recent decisions of this Court, including Meachum, Your Honor.

Under this approach, if a person is able to assert a legitimate claim of entitlement to a government benefit, due process ensues.

In parole, such a legitimate claim of entitlement is a product of the practices and understandings that have grown out of the system of rules that govern the parole system. Very much like in Perry vs. Sindermann, where there was a de facto system of teacher tenure, an unwritten common law of parole also exists.

This unwritten common law generates a substantial claim that if a prisoner meets certain criteria or conditions, parole will be granted.

QUESTION: Well, didn't Meachum reject the idea that there could be any claim for a hearing in connection with a transfer, other than on a statutory basis?

MR. RIVKIN: I think the difference between Meachum and this case is two or threefold.

First of all, in Meachum the State had not created any sort of apparatus or system or statute governing classifications in prison, whereas in the parole situation, the STate has created the parole apparatus as an integral part of the sentencing apparatus.

QUESTION: But it hasn't said you will be paroled if such and such a condition is met, has it?

MR. RIVKIN: No, the State hasn't said that, but, in fact, that's what happens.

QUESTION: Well, but then that's a non-statutory thing.

MR. RIVKIN: It's a practice.

QUESTION: Yes, but didn't Meachum reject the notion that a practice, even if it could be shown, was the equivalent of a statutory entitlement?

MR. RIVKIN: I don't think so, Your Honor. I think the distinction is between the intention of the State in creating a system of classification and the discretion vested,

which is vastly different in the classification situation where the State has not spoken nor has the prison administrator spoken, whereas, here, not only the Legislature has spoken, not only the sentencing judge is intended, but the Board itself has promulgated certain criteria.

The measure of discretion here, I believe, is much more bounded.

Secondly, I believe also that the nature of the interest involved in Meachum is not the kind of clasic fundamental bedrock interest in freedom that parole involves. The notion of intrastate transfer, I believe, is of a different order, and should be treated so by the Court.

Thirdly, Meachum also involved considerations of internal prison security, which are not at all in the picture in this case.

I would like to reserve --

QUESTION: Even though there is not an explicit statutory provision of the kind described in my brother Rehnquist's question, there is a kind of a common law entitlement similar to -- or practical, a practical entitlement similar to that discussed in Perry v. Sindermann, and in the Roth case.

MR. RIVKIN: Exactly, Your Honor, a claim of entitlement exactly similar.

I'd like to reserve the remainder of my time for

rebuttal, please.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rivkin.

Mr. Kimberlin.

ORAL ARGUMENT OF PATRICK B. KIMBERLIN, III, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. KIMBERLIN: Mr. Chief Justice, if the Court please:

The respondents would first address themselves to the theshold issue here, which we believe is one of jurisdiction.

As the Court is aware, the petitioner was released on parole. We believe that this fact has essentially mooted the case, and therefore this Court no longer has jurisdiction under Article 3, since there is no longer an active case of controversy.

We believe that the fact that he has been paroled eliminated any person stake in the outcome which he may have had in this case.

Furthermore, we do not believe that the fact that when the complaint was filed in this action it had allegations pertaining to a class action, or requesting a class action under Rule 23.

The fact of the matter is the case was not certified as a class action, has never been certified as a class action, and of course there has been no definition of a class in this case.

QUESTION: How do you mean -- first of all, of course, the district judge, Judge Mac Swinford -- the late Mac Swinford -- dismissed this without any opportunity to --

MR. KIMBERLIN: Yes, Your Honor.

QUESTION: -- or occasion to certify it as a class. Although it was requested in the complaint, wasn't it?

MR. KIMBERLIN: Yes, Your Honor, that's true.

QUESTION: Then how do you explain the Court of Appeals reference to this case as a class action, in the fourth line of their opinion of their short order?

MR. KIMBERLIN: Well, we do not believe that the reference to it as a class action, in effect, establishes that it is a class action, Your Honor.

QUESTION: Not in the facts. You don't -- there's no explanation for that. It wasn't conceded to be a class action, then?

MR. KIMBERLIN: That's correct, Your Honor. That's correct.

QUESTION: It was or was not?

MR. KIMBERLIN: It was not conceded to be a class action at any time, Your Honor.

QUESTION: All right.

MR. KIMBERLIN: Furthermore, we do not believe that this particular --

QUESTION: Mr. Kimberlin, or General Kimberlin,

before you go on, I take it the petitioner is still in custody in a legal sense, in that he is still under -- he is on parole now?

MR. KIMBERLIN: He is on parole now.

QUESTION: And does that mean he's subject to certain restrictions on his conduct?

MR. KIMBERLIN: Yes, he is, Your Honor.

QUESTION: Under the Kentucky procedure, may he apply for a change in the present restrictions, is there a procedure for a person on parole, seeking to modify the restrictions; is there?

MR. KIMBERLIN: Yes, that is possible, Your Honor. He may --

QUESTION: Would that be in the nature of a parole release hearing if he made such an application?

MR. KIMBERLIN: No, because -- well, in the parole release hearing, yes, that would be somewhat similar to that, but not a parole consideration hearing.

A parole consideration would determine the initial issue, whether to actually grant a parole as opposed to any modification of a parole once it is in fact granted.

QUESTION: Well, if he asked for a modification, would he be entitled to any particular kind of procedure that would be followed in such a request?

MR. KIMBERLIN: Well, Your Honor, I do not know

exactly what the procedure would be, or what he would be entitled to in that type of hearing in which he would ask for a modification, I do not know.

QUESTION: I see.

MR. KIMBERLIN: We do not think that this case falls within the very narrow doctrine of the case of a reoccurring nature, yet evading review, because it appears to be that this particular doctrine only applies to cases where the same parties once again come into conflict at some subsequent time.

Here we believe, at best, only a very remote possibility that the petitioner would, at some future point in time, violate his parole, which is what he would have to do to be --

QUESTION: What about the petitioner's figures that one-third of them do?

MR. KIMBERLIN: Well, that figure of course would --

QUESTION: That's a pretty good percentage.

MR. KIMBERLIN: But that only applies to those who actually do, and I don't believe this Court would have to entertain the presumption that this particular individual would, in order to --

QUESTION: But I thought you said you assumed that he wouldn't. I don't think you can assume either one, can you?

MR. KIMBERLIN: Well, I think there would be a presump-

tion that an individual who has been granted a parole would do everything he could to sustain that parole and continue it in order that he may maintain the conditional liberty that that parole reflects.

QUESTION: And you also recognize the fact that one-third do not?

MR. KIMBERLIN: One-third do not, one-third do violate their paroles, yes, Your Honor; that's true.

Finally, we do not feel that there are any collateral legal consequences, which the petitioner would show that would indicate that he would be adversely affected as a consequence of his having been denied parole at the first parole consideration hearing, which would bring him within the purview of that particular rule.

And one other consideration so far as --

QUESTION: General, how do you -- I don't want you to give legal advice to the petitioner or run a law school or anything, but how could he evade all of this?

MR. KIMBERLIN: I'm sorry, Your Honor, I didn't hear you. How could --?

QUESTION: How could the petitioner in this case evade the situation he is now in?

MR. KIMBERLIN: You mean in light of the mootness problem here?

QUESTION: Yes, sir.

MR. KIMBERLIN: Yes, sir.

It would seem to me that the first thing to have done is to try to attempt in every possible way to achieve certification of the class at some point in time prior to the case reaching this stage in the litigation. And secondly, --

QUESTION: Well, what could he have done?

MR. KIMBERLIN: -- to have made his -- secondly, he could have filed as many --

QUESTION: What could he have done?

MR. KIMBERLIN: -- co-plaintiffs as possible in this suit, who were in the same situation he felt that he was in.

QUESTION: Well --

MR. KIMBERLIN: In order to insure that the case would survive.

QUESTION: I thought I limited it to this case. What could he have done in this case, where he had two people, he asked for a class action, the judge ignored it; what could he have done?

MR. KIMBERLIN: It's a possibility he could have asked for a class action in the United States Sixth Circuit Court of Appeals. Whether they would have certified the class --

QUESTION: And your authority for that is what?

MR. KIMBERLIN: Well, I would say it is only a possibility, Your Honor. I don't know whether there is authority that would sustain that proposition.

QUESTION: Do you know of any case that --

MR. KIMBERLIN: No, Your Honor, I do not.

QUESTION: So I guess he's just stuck, if you -- all the State has to do is, when a man files a suit like this, is to parole him, and that's the end?

MR. KIMBERLIN: Well, Your Honor, he came up for a second parole consideration hearing as a matter of course, at which time he was granted the parole which he desired. And that happened just prior to certification being -- to the petition for writ of certiorari being granted in this case.

QUESTION: Then, truthfully, your only suggestion is that he could have asked the Court of Appeals.

MR. KIMBERLIN: Well, there are any number of cases that have been before this Court, Your Honor, where individuals -- whatever action was coming against them, they consider it adversely, for which they were seeking protection or relief no longer existed, or they themselves were no longer within the purview.

QUESTION: But this -- the case is not against him, this is his case.

MR. KIMBERLIN: Yes, Your Honor.

QUESTION: Well, of course, petitioner has gotten everything he wants in the -- I mean, he's gotten parole. It isn't entirely accurate to say that he's stuck. It's really his lawyers or the class which he might have wanted to represent

that are stuck.

MR. KIMBERLIN: Well, that certainly is correct, Justice Rehnquist, because, after all, he has in fact been granted the parole. And that's why we feel he no longer has any personal interest at stake.

QUESTION: Then the class action is just out?

MR. KIMBERLIN: We believe it is out. We do not believe it could survive.

QUESTION: And you don't know of any way to keep it in?

MR. KIMBERLIN: No, Your Honor.

QUESTION: And you don't know of any way that a group of prisoners who want this done can get relief, other than all of them joining as petitioners?

MR. KIMBERLIN: If I were counsel, I would have seen to it that very many of them would have joined this plaintiff, to get --

QUESTION: So that is your answer. Your answer is the only way is to join in the lawsuit.

MR. KIMBERLIN: Yes, Your Honor, that's true.

QUESTION: So that's the end of class action in this field.

MR. KIMBERLIN: So it has to -- end any class action?

QUESTION: As a class action in prisoner cases, where they can be paroled, there is no way for a class action.

MR. KIMBERLIN: Well, if the district judge would have granted a class action, that would have resolved the problem; there have been cases in other circuits where the judge has granted class action status.

QUESTION: Where you have a district judge who refuses to certify a class, there's no possibility of a class action?

MR. KIMBERLIN: I do not know that that's true, Your Honor. That may be, but I do not know.

QUESTION: Mr. Kimberlin, just going back to Justice Rehnquist's question about the petitioner having been granted all the relief he sought: He did complain of the fact he did not get a hearing, an adequate hearing the first time he came up for parole, did he not?

MR. KIMBERLIN: Yes, Your Honor, that's true.

QUESTION: And if he should prevail in the litigation, is it completely inconceivable that there might be some remedy for the failure to grant the hearing, when he says he was constitutionally entitled to a hearing? Such as damages or a statement of the reasons why he was denied the first time.

MR. KIMBERLIN: Yes, Your Honor. Yes.

QUESTION: Is that inconceivable?

MR. KIMBERLIN: Yes, Your Honor, that is true, that is a possibility.

QUESTION: Then how can the case be moot?

MR. KIMBERLIN: Maybe you have me there. I'm --

QUESTION: I think I do.

[Laughter.]

MR. KIMBERLIN: Okay.

If they had not granted him a parole, then he could possibly have sought relief in State courts, but he was granted a parole.

QUESTION: But he's seeking relief in a federal court now for that very reason, isn't he?

MR. KIMBERLIN: Well, for the same reasons though, but he did have -- he has been extended relief. We don't believe -- that he has been extended a parole, that he's entitled to any relief now, because we don't feel he has any personal interest at stake.

QUESTION: But he did not get parole the first time he asked for it.

MR. KIMBERLIN: No, he did not, Your Honor, that's true.

QUESTION: He served some time in jail as a result of that.

MR. KIMBERLIN: Yes. But that would lead us, then, to the very basic nature of the case itself in parole consideration, which I think I shall now address myself to, as to --

QUESTION: Before you do that --

MR. KIMBERLIN: Yes, Your Honor.

QUESTION: -- any idea that there is some retroactive possible kind of relief presupposes the answer to the question presented by the entire case, does it not?

MR. KIMBERLIN: Yes, Your Honor, this is why I think I perhaps now should address myself to the very essence of the case on the merits.

QUESTION: Did the complaint ask for damages?

MR. KIMBERLIN: No, Your Honor, it did not ask for damages; and, in fact, I do not believe by a perusal of the complaint would even reveal that the petitioner himself ever alleged that he was entitled to be paroled at that first hearing.

QUESTION: The last prayer for relief is that the plaintiffs be awarded any and all other relief to which they or the members of their class may appear to be entitled. Under that prayer a judge would have the power to grant broader relief, would he not?

MR. KIMBERLIN: That would be a possibility, although he did not specifically request it.

QUESTION: When we talk about mootness, we're talking about the power of the district court, not the form of the pleading, are we not?

MR. KIMBERLIN: Yes, Your Honor.

QUESTION: And is it your understanding that the

Court could award damages without a specific prayer for damages?

MR. KIMBERLIN: No, Your Honor, I believe he would have to specifically request damages. It is a possibility, however.

QUESTION: That has always been my thought; yes.

MR. KIMBERLIN: We would now turn to the primary issue on the merits, which is whether the due process clause does in fact attach to parole consideration hearings in Kentucky.

And it is the belief of the respondents that it does not. The whole predicate upon which constitutional application, in so far as the due process clause is concerned, in the past, has been that a liberty interest or property interest is at stake.

Here we do not feel that there is either a liberty or a property interest at stake.

The thrust of the petitioner's argument is that he does in fact have an interest in liberty. We believe that that interest in liberty has been effectively extinguished as a consequence of his convictions in the State trial courts in Kentucky, for robbery and armed robbery, for which he received ten and twelve-year sentences to be served concurrently.

We believe that, as a consequence of this conviction, he has been -- his liberty interest no longer exists within the sense of what we're talking about here within the context of this case.

Obviously a person -- the fact that a person has been convicted as a felon and sent to jail does not mean he loses all his constitutional rights, and we certainly are not saying that.

We are saying that in so far as the context of parole consideration is concerned, his confiction does extinguish his liberty interest.

Furthermore, we do not feel he has any property interest at stake. An examination of the relevant statutes and regulations in Kentucky will reveal that there is no entitlement given to the petitioner in so far as parole is concerned.

QUESTION: General Kimberlin, let me put a hypothetical case to you.

Supposing the State of Kentucky had a system of indeterminate sentences, which provided that, say, the sentence would be one to three years, that after the prisoner had served the first year there would be a hearing before the judge, at which time the judge would decide whether or not any additional time should be served, and the judge would have absolute and total discretion, either to release the man at that time, or to say he should serve another year or two.

Would the due process clause entitle the prisoner to a fair hearing at that time?

MR. KIMBERLIN: Well now, we're dealing with a judge type situation, and, in the State sense --

QUESTION: Well, as soon as you answer that, I'm going to ask if the case would be any different if the power were given to a parole board instead of a judge.

MR. KIMBERLIN: Yes, Your Honor.

I think it would be different then from the situation we have here, in that the sentencing process has ended, once and for all, when the person has left the State trial court level. Sentencing then ends.

QUESTION: Well, their argument, of course, is that as a practical matter the sentencing process really hasn't ended, and that's why I am trying to put the hypothetical case where the statute made it perfectly clear that the decision on how long the man would be incarcerated would be made by a judge after a third of the statutory period had already been served, and the judge would then have absolute discretion, either to prolong the period of incarceration or to release the man.

How would that be different from the situation we have?

MR. KIMBERLIN: Well, perhaps it is not different from the situation we have here.

QUESTION: Well, then, if it's not different, would the due process clause apply to such a hearing?

I think that may be the issue here.

MR. KIMBERLIN: Well, I think perhaps it would not apply in that kind of situation coming before a judge, if he has

complete discretion upon a statutory entitlement that a person be considered after service of a certain amount of time of his sentence.

QUESTION: So the key to your position really is the totality of the discretion vested in the Parole Board or the sentencing judge, is that it?

MR. KIMBERLIN: I think the key to our position here is what is his interest here, is it an identifiable interest that can be clothed in the protections of the due process clause? Is it one of liberty or is it one of property? And we don't think it's either one.

Counsel, Mr. Rivkin indicated just previously that his case doesn't depend on the right to parole. Well, that --

QUESTION: Just a minute. Now, I take it his position is that it's a liberty interest because the question to be decided in: How long shall a man stay in jail?

MR. KIMBERLIN: Well, that's an expectation in so far as the petitioner himself is concerned. He hopes to be released. He has a valid sentence against him, that's been rendered against him, --

QUESTION: And he hopes to be one of the 60 percent instead of one of the 40 percent?

MR. KIMBERLIN: Why -- I don't know exactly what the statistics would mean, because in statistics we're looking at an end result; and in order to build up those statistics to

begin with, the Parole Board had to consider each case on a case-to-case basis, and the parole consideration itself reflects a very individualistic treatment of each prisoner.

The Parole Board has an identity of interest with the prisoner. If he can possibly be paroled, they will want him to be paroled, if it's in the best interest of the individual and of society.

And we feel that there must be a predicate for due process applications. In Meachum vs. Fano, there was no predicate for a due process application. There has to be a liberty or property interest.

And, furthermore, we think it not only has to be a liberty or property interest, but it has to be a liberty or property interest which is presently being enjoyed by the person who seeks protection or to which he is presently entitled to.

In the Morrissey case, --

QUESTION: He has to be deprived of it. I mean, --

MR. KIMBERLIN: Exactly, he has to be deprived of it.

QUESTION: -- in order to trigger the due process clause.

MR. KIMBERLIN: In the Johnson case, out of the Second Circuit Court of Appeals -- United States ex rel. Johnson vs. New York Parole Board. In that case the Second Circuit equated the expectation of parole with a person's status who has already been granted parole, and they say that -- they referred in there

to a footnote, footnote 8 in the Morrissey case, referring to Bey vs. Connecticut, where this Court, Mr. Chief Justice Burger, who wrote the Morrissey opinion, used that footnote. And that footnote is something to the effect that it is not sophistic to distinguish between mere anticipation or hope of being granted parole, as opposed to a person who has already been granted parole.

And this footnote was used in in that part of the Morrissey decision which dealt with the nature of the interest that was involved, not the sum weight. Yet the Johnson case, in the Second Circuit, distinguished that footnote by saying that it makes no difference whether he's presently enjoined and presently entitled to it, because all that footnote means is that the Supreme Court indicated that more constitutional protections could be accorded to somebody who is already on parole and that right may be taken away, as opposed to --

QUESTION: Mr. Kimberlin, --

MR. KIMBERLIN: Yes, Your Honor?

QUESTION: Another point. What is, quote, "close supervision", end quote, in Kentucky?

MR. KIMBERLIN: I'm not exactly sure what that would mean, other than the fact of talking to other respondents --

QUESTION: Well, don't we have to know?

I mean, does he have to go to the prison every day?

MR. KIMBERLIN: Well, --

QUESTION: Or would he spend nights there, or what is close supervision?

MR. KIMBERLIN: I don't know that it's necessary to know what -- exactly what close supervision would be, because this is the standard we have for someone who is on parole.

QUESTION: You say that this case is moot because the man is out on parole under, quote, "close supervision", end quote; and you tell me that I don't need to know what close supervision is?

MR. KIMBERLIN: Well, we have talked to our clients about close supervision, about the aspects of this case in the individual characteristics of Scott; and close supervision would be checking in with parole officers, being limited in where he could go, and that sort of thing. But, no, we do not know. There has never been an opportunity by the respondents to set forth this specific factual information which would be pertinent to this case.

QUESTION: Has the petitioner put anything in the record in this case as to the nature of --

MR. KIMBERLIN: Of close supervision, Your Honor?

QUESTION: -- close supervision?

MR. KIMBERLIN: No, I do not believe so. I don't think so.

QUESTION: Well, whose job is it on this mootness point? It's your job, isn't it?

MR. KIMBERLIN: Well, I believe it's not my job. I believe --

QUESTION: Well, if he has to report to the prison three days a week and spends two days in the prison, would you say the case was moot?

MR. KIMBERLIN: Yes, Your Honor. Because those kind of considerations deal specifically with the possibility --

QUESTION: Well, if he was released on parole one hour a week, would you say this case was moot?

MR. KIMBERLIN: I do not think that those considerations would be relevant to the consideration of mootness, to the determination of mootness, Your Honor.

QUESTION: Well, what is it? What makes it moot? It's that he is out of prison.

MR. KIMBERLIN: Yes, Your Honor.

QUESTION: Well, I'm saying if he's not really out, it wouldn't be moot, would it?

MR. KIMBERLIN: If he were actually back in the prison again?

QUESTION: If he wasn't actually out. Which is just as clear to me as close supervision would be.

MR. KIMBERLIN: Anyone who is on parole, there is always some limitation as to -- it is a conditional liberty, which was recognized in the Morrissey case. Yes, Your Honor.

Finally, we would say that the Court, we feel, should

give consideration to whether the person is actually enjoying such an interest or is entitled to such an interest.

An expectation, we feel, is not sufficient to constitute -- to extend constitutional due process protection. And that's all we believe that the petitioner has here.

QUESTION: General Kimberlin, on that very point, what do you say about the Goldsmith v. Board of Tax Appeals? Do you remember the case involving the accountant who wanted to get admitted to the --

MR. KIMBERLIN: Yes, Your Honor.

In so far as that case is concerned, and perhaps the bar cases, there was an entitlement, a statutory formal policy set forth in which it established a plan, saying someone --

QUESTION: Well, let me just interrupt you. Is it a statutory matter, or was it a policy by practice over and over that they would admit these people?

MR. KIMBERLIN: Well, I think it was a rule of court in the tax case, because it would be the Court of Tax Appeals that would be in charge of permitting people to come before it.

QUESTION: Did not the rule in the tax case specifically provide that the Board had absolute discretion to turn the man down?

MR. KIMBERLIN: Well, it may have been, Your Honor, but -- now, if someone in that Goldberg [sic] case, if an individual fell within the class that would be entitled to

become a member of the Tax Court Bar, then he could not be denied relief without due process being accorded, I believe.

Now, the thing here is, the State of Kentucky permits someone -- it establishes a class of persons who may be considered for parole, it does not establish, by policy or statute or regulation, a class which entitles someone to parole.

And I believe there's a great difference in that.

If we had a statute which said that a person, if he met A, B, C, D and E, is entitled to parole, then we could not deny him a parole once he establishes that he meets A, B, C, D, and E.

QUESTION: Well, did you read the Goldsmith case as indicating that any lawyer and any accountant was entitled to be admitted to practice?

MR. KIMBERLIN: No, Your Honor. I believe that if an attorney or an accountant in that particular case fell within the class, that he would be entitled to be admitted, that he could not subsequently be denied upon a discretionary basis, without a due process hearing.

Here there is no class in which this petitioner or any other prisoner in Kentucky would fall within which would entitle him to be paroled.

If there were, that would establish an entitlement to a liberty interest; and here there is no such entitlement to a liberty interest or a property interest, and there's obviously

nothing that he's presenting enjoying within the property or liberty aspect.

We would now turn to -- assuming, arguendo, that the due process does in fact apply to this case -- how much process is due.

We would first suggest the possibility of a remand to the lower courts to establish an evidentiary basis in order to determine exactly what the policies and practices of the Parole Board are, as opposed to how they have been pleaded in this particular case.

In the event this Court does not deem a remand necessary, we would suggest that the present policies and practices, as we have -- are able to determine them now, are sufficient to meet with minimal due process standards.

After all, the entire Parole Board meets to consider a parolee at a parole consideration hearing. If they cannot all meet, of course a quorum will meet to consider the individual.

He has the right to be present, and he has the right to be heard. The Parole Board will consider, under present regulations, some 14 specific factors, and there is one 15th factor which, in effect, permits the Parole Board to consider any other possibility.

We feel that in light of all this, the risk of any possible error is, at best, minimal, and the chance of

arbitrariness minimal. And we feel that these minimal due process protections are sufficient to accord no change in the procedures in Kentucky at this time.

Specifically, as to some of the requests that he has made for relief, in so far as an attorney is concerned, we feel that this -- the introduction of counsel at a parole consideration hearing, and there are several hundreds of these held every year by the Parole Board, would turn the hearing into a truncated trial-type procedure and change the very nature and form of the consideration in the role of the Board into almost an adversarial type process. And we do not feel that that is at all necessary.

And there has only been one other case in which we feel, perhaps in Goldberg vs. Kelly, where the right to counsel has been extended in the whole -- in the entire procedure, administrative procedure, clothed in a trial-type proceeding.

We do not feel that there is any necessity for a written list of reasons. It is the actual practice in most cases now for the Parole Board to extend to the person being considered an oral reason why he is being denied parole. And we feel that this is sufficient.

And that would effectively eliminate that argument, we feel, in so far as the due process question is concerned.

On the meaningful hearing and opportunity to rebut adverse facts, we feel he has these by his right to be present

at the hearing and to address the Board.

And, from talking with the respondents, it is their position that any time that they feel there is some problem in the record, in so far as possibly granting the particular person a parole, they will discuss it with him at the hearing. And we feel that this is a sufficiently meaningful hearing, in so far as minimal due process is concerned.

QUESTION: Mr. Attorney General, suppose no hearing were accorded a prison inmate at all, and the Board denied parole without any hearing. What recourse, if any, would the prisoner have?

MR. KIMBERLIN: Well, he has an entitlement. If, under our rules and regulations and statutes, he were never accorded a hearing, he would be entitled, I believe, to pursue relief in the State Circuit Courts, for the reason that he has, under our statutes and regulations, an entitlement to be considered on the basis of whatever his sentence may be after a certain service of that sentence, to be considered for parole.

And if that would not be extended to him, that entitlement, we feel, could be protected by going into the State Circuit Courts in order to seek relief and to have -- so the Circuit Court could order the Kentucky Parole Board to consider him for parole if, in fact, no hearing was ever held at all.

QUESTION: In the nature of mandamus.

MR. KIMBERLIN: Essentially that, yes, Your HOnor, that would be true.

In conclusion, we would submit that the due process clause does not attach to parole consideration hearings in Kentucky, and that, if it does, the current procedures do comport properly with the minimal aspects of the due process clause of the Fourteenth Amendment.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kimberlin.

Do you have anything further, Mr. Rivkin?

You have two minutes.

REBUTTAL ARGUMENT OF DEAN HILL RIVKIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. RIVKIN: Just a few points, Your Honor.

I believe that General Kimberlin stated our case when he noted, in response to questions about Goldsmith, that an individual -- or if an individual becomes a member of the class, then he or she is entitled to due process protection. I think that is precisely the nature of the process of parole release.

The Board, exercising discretion, uses the criteria that it has developed over the years. It reviews the files. As the statistics note, a large number of individuals meet those criteria and, in fact, are paroled.

This is much closer to the sentencing analogy that

Mr. Justice Stevens noted, and to the type of discretion that was exercised in Morrissey vs. Brewer, and the type of process that existed in Morrissey vs. Brewer than, for instance, in Meachum vs. Fano.

Parole release is part of this continuum in the criminal justice process, involving the important interest of release on parole, as opposed to whatever interest an individual would have, which is not constitutionally protected under Meachum vs. Fano.

Finally, I think that a reading of deprivation under the due process clause to excluse this case would be an overly formalistic reading, under this Court's cases in Goldsmith and Schware and Willner and, last term, in Hampton. And, for these reasons, we believe that the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed, and the case remanded for an evidentiary hearing and further proceedings.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:59 o'clock, a.m., the case in the above-entitled matter was submitted.]

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