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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-461

TITLE BOARD OF PARDONS AND HENRY BURGESS, Petitioner
v. GEORGE ALLEN AND DALE JACOBSEN, ETC.

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

BOARD OF PARDONS AND HENRY BURGESS,

Petitioner

v. : No. 86-451

GEORGE ALLEN AND DALE JACOBSEN, ETC.

Washington, D.C.

Wednesday, April 1, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 9:59 a.m.

APPEARANCES:

CLAY R. SMITH, ESQ., Assistant Attorney General of Montana, Helena, Montana; on behalf of the Petitioners.

STEPHEN L. PEVAR, ESQ., Denver, Colorado; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

(9:59 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in Number 86-461, the Board of Pardons and Henry Burgess versus George Allen and Dale Jacobsen.

Mr. Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF CLAY R. SMITH, ESQ.

ON BEHALF OF THE PETITIONER

MR. SMITH: Mr. Chief Justice, and may it please the Court:

The issue before the Court today is straightforward: does Section 46-23-201 of the Montana Code Annotated create a liberty interest in parole release protected under the due process clause of the Fourteenth Amendment.

The facts giving rise to this case are equally straightforward. In May 1984 the Respondents, on behalf of themselves and all present and future inmates at the Montana State Prison initiated an action in the United States District Court for the District of Montana alleging in relevant part that the petitioners, who are the Montana Board of Pardons and its Chairman had denied their parole release application without an

appropriately worded individual determination.

Attached to the complaint were communications from the petitioners to the respondents stating that the respondents' parole applications had been denied because of the nature of their offenses, and further recommending that the respondents commence, or continue participation in psychological therapy programs.

In January of 1985 the district court dismissed the complaint for failure to state a claim, relying on this Court's 1979 decision in Greenholtz versus inmates of the Nebraska Correctional and Penal Institute. The respondents appealed to the United States Court of Appeals for the Ninth Circuit, raising as the only question that presented before the Court today.

In June of last year the court of appeals reversed the district court's judgment, finding that the Montana statute did create a protected interest. In relevant part the Montana law provides that the Board of Pardons shall release on parole any inmate who otherwise satisfies certain specified minimum time of incarceration requirements.

When in the Board's opinion there is reasonable probability that the inmates may be released without detriment to themselves or to the community.

The statute further provides that the Board may release on parole prisoners only when the Board determines that such release is in the best interest of society and only when the Board concludes that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen.

The Montana Supreme Court in a series of cases commencing in the early 1960's has construed parole under our statute as creating only a privilege or an act of grace and not a right. In 1962 in the case of Goff versus State, the Court held in the context of an initial parole decision denial that, "Because of the discretion vested our Board under our statute, such decisions were not reviewable by state courts."

Several years later in another case, In Re Frost, our Court held that merely because an inmate satisfied the minimum time of incarceration requirement, that parole was not automatically required under the statute.

The issue before the Court today must in the petitioner's view be resolved by answering a single question: does the Montana law convey to an inmate a reasonable expectation of favorable action upon his parole application simply by virtue of the inmate's having satisfied the minimum time of incarceration

requirements which under the law are a condition precedent to the right to even submit an application for parole release.

This is question which, we respectfully submit, was not straightforwardly addressed by the Court of Appeals below, nor has it been addressed directly by the respondents in their briefs before this Court in this case. It is a question which the petitioners believe must be answered negatively.

In resolving this question --

QUESTION: General Smith, may I just ask, the statute certainly doesn't give them that right because it says they can't be released unless they meet the time requirement, but it says they shall be released when, in the opinion of the Board, there is reasonable probability the prisoner can be released without detriment to the prisoner or to the community.

Is it your view they don't have a duty to release him even when they make that finding?

MR. SMITH: Your Honor, under our statute once the Board of Pardons determines that the facts underlying a particular parole application are such that the release can occur consistently with the three criteria the statute specifies, then under our law the Board is required to order release.

QUESTION: So, he has a right to release if those conditions are met?

MR. SMITH: If the Board determines in its discretion that those conditions are met, that is correct, sir.

QUESTION: What are the three conditions?

MR. SMITH: The three conditions are as follows: in Subsection 1 of 36-23-201 the statute states that a prisoner shall be released on parole when in the Board's opinion such release can be effected without detriment to the prisoner or to the community.

In Subsection 2 of that provision it states that release shall only be ordered if the best interests of society will be furthered and only when the Board concludes that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen. As a consequence, in the petitioner's view, the statute sets forth three general criteria which govern its decision making.

In resolving the question before the Court today, the Court has substantial guidance from its previous prisoner entitlement decisions involving rights alleged or held to arise under state law. Of particular importance today, of course, is the Greenholtz decision.

There the Court initially held that the

existence of the mere possibility of parole, at least under a state statute, did not give rise to a protected interest. The rationale for the Court's decision in Greenholtz is especially pertinent to our case.

Because parole decisions depend, as the Court stated in Greenholtz, upon an amalgam of factors some of which are objective but many of which are purely subjective evaluations by Board members based upon their expertise or experience in the difficult and sensitive task of evaluating the advisability of parole release, there is no set of facts which have shown mandates a favorable decision to the inmate.

Stated another way, under a typically worded parole statute in this country an inmate has no legitimate expectation at the outset of the parole application process that a Board will rule favorably upon his application because the nature of the decision making that goes into that determination is so general and so subjective.

Thus, as the Court further noted in Greenholtz, a prisoner has at most a unilateral hope that the benefit sought will be obtained, but not a reasonable expectation of affirmative relief from the involved decision maker.

QUESTION: What did the court of appeals say

here, that there was an expectation but they didn't prescribe any procedures, did they?

MR. SMITH: The court of appeals did not directly address the question of whether a reasonable expectation of parole release arises simply by virtue of a prisoner satisfying certain time of incarceration requirements. The court of appeals instead apparently stated that, "Because our statute requires release when the Board determines that the three general criteria that I referred to before are satisfied, that the construct of the statute is such as to create a reasonable expectation -- excuse me, to create a liberty interest.

QUESTION: And your contention is that because the second criteria is because it requires the opinion of the Board as to reasonable probability that the prisoner can be released without detriment to the community, that is sufficiently subjective so there is no reasonable expectation?

MR. SMITH: The petitioner's view of the statute is that it sets forth three general criteria. The criteria that the Chief Justice just referred to is the first that appears in Subsection 1. There are two others in Subsection 2.

It is the petitioner's position that because

those criteria, taken in the aggregate, impose such general release considerations that an inmate can have no reasonable expectation that his set of facts will be deemed by the Board to warrant favorable action on his parole or release application.

QUESTION: Doesn't he expect it be decided in his favor?

MR. SMITH: That is correct. Stated another way, Your Honor, the Board must conclude that the facts underlying a particular parole release application are such that its action to effect parole is not constrained or inconsistent by any of the three criteria.

QUESTION: Well, is it your position that -- I guess the complaint here is that the Board not only didn't grant parole but it didn't say why.

MR. SMITH: Well --

QUESTION: And it doesn't make findings. Do you say that because there is not a liberty interest there is just no constitutional imperative that the Board make the findings the statute states, or deals with?

MR. SMITH: The statute does not require the Board to make specific findings with respect to a particular parole release application.

QUESTION: Doesn't require them to write it

down or to say anything to the applicant?

MR. SMITH: The second claim for relief in the complaint states that the due process clause was violated, or is being violated, by the absence of an appropriate hearing process.

QUESTION: And the Court of Appeals, I take it would, finding a liberty interest, does it dictate or did it dictate that there should be a hearing or --

MR. SMITH: No, Your Honor, it did not. The only question before the court below was that upon which the complaint in the district court had been dismissed, namely whether our statute in the first instance creates a protected liberty interest.

There was no issue of whether -- if it did create a protected liberty interest, the hearing processes accorded the respondents sufficed under the due process clause.

QUESTION: May I just be sure I understand your position, General Smith. If there is no liberty interest at all, does that mean in your view that the Parole Board as a matter of federal law at least, could whenever a prisoner served the requisite time and he files an application for parole, reciting what the statute says, and he says that he thinks he can behave in the community and so forth, that the Parole Board

could simply say, "We're just not going to look at your application because we're busy doing other things. We will arbitrarily deny it for the next six months."

Could they do that, consistently with the Constitution? Do they have any obligation to decide whether he is entitled to parole or not?

MR. SMITH: Your Honor, I believe that question must be answered with reference to the statute itself. It states that within two months of a prisoner's eligibility date for initial consideration, in other words within two months of that date upon which he has served the minimum time of incarceration required in the statute for consideration, the Board must review his files.

There is no requirement in that provision for hearing unless it grants a parole release application. However, a later provision states that any person who wishes to appear before the Board shall be allowed to appear before the Board.

So, if an inmate submitted a parole release application, and not all do at such time they become eligible to submit an application, but if an inmate does submit an application and does wish to appear before the Board, then the Board will schedule an interview. Typically the Board does that even without a request.

QUESTION: Well, I don't think that answers my question. My question is, as a matter of federal law, is it your position that the Board could simply say, "We will not even review your application. You have no liberty interest; therefore we have no obligation as a matter of federal law to even take a look at the darned thing"?

That is what your position is, as I understand it.

MR. SMITH: That is not our position, Your Honor.

QUESTION: Well, what is at stake here? I don't quite understand what the dispute is all about.

QUESTION: I thought that was your position too. I don't see how --

MR. SMITH: What is at stake here, petitioners believe, is whether any constraints are imposed upon its decision making process by the due process clause of the Fourteenth Amendment.

QUESTION: And your answer is no, there are none. Therefore you can just, as a matter of federal law, you can say, "We're sorry, we're not going to open or even read your application."

MR. SMITH: That is correct, but as a matter of state law there may be certain enforceable --

QUESTION: But you do have some duties as a matter of state law but you say they are not sufficient to impose any duties as a matter of federal law?

MR. SMITH: No. As the Court held in Hewitt versus Helms and in Olin versus Wakinekona, the mere existence of mandated procedures in a penal system setting does not in itself give rise to a protected liberty interest or warrant protection in and of itself under the due process clause.

QUESTION: Mr. Smith, do you take the position that Montana state law requires the state to do exactly what Greenholtz would say are the minimum requirements in any event if it were a matter of federal law; namely, an opportunity to be heard by the prisoner and to give some reasons for denial?

MR. SMITH: It is our position that the current procedures being utilized by the Board are consistent with due process requirements, but again that is an issue which has not been litigated.

QUESTION: Are they consistent with the requirements espoused in the Greenholtz case? Does Montana state law comply with what this Court said in the majority opinion in Greenholtz was required under the Nebraska statute?

MR. SMITH: Your Honor, I believe it does.

QUESTION: So, what's at stake here is not any change whatever in Montana's procedure. It's just the point you are hoping we will make that whatever Montana requires is not a federal requirement?

MR. SMITH: That is correct, Your Honor.

QUESTION: It wouldn't alter your handling of the cases at all?

MR. SMITH: Well, what I would state is that the respondents might disagree with my contention, and it might be a matter of substantial litigation below at the District Court level, or a protected interest to be held created by the statute.

QUESTION: One of the difficulties for me with this case is the very abstract proposition that's presented. The idea, is there a protected liberty interest kind of floating up there in the air and we don't have any idea what the court of appeals thought were the procedures that federal law required to implement that interest.

That's not your fault, I realize.

MR. SMITH: The case, of course, went to the court of appeals on dismissal of complaint for failure to state a claim, and since it was a singular discrete issue presented and that issue was the only question addressed by the court of appeals --

QUESTION: But what did the plaintiffs ask for in their complaint? What sort of procedures that weren't being provided by the Montana Parole Board did they claim they were entitled to as a matter of federal law?

MR. SMITH: Well, the complaint is particularly skeletal in nature and did not set forth the precise kinds of procedures that the respondents believed would be appropriate under the due process clause. They suggested in their first claim for relief that parole applications were being denied inconsistently with the criteria in the statute.

They suggested in the second claim for relief that the parole release applications were being denied without an appropriate hearing. There was a third claim based on the Eighth Amendment that is not relevant to our case today.

So, to answer your question, the complaint is not of much assistance in what respondents believe is appropriate in this case.

QUESTION: -- this lawsuit seeks to compel the Board of Pardons to use proper criteria in determining a prisoner's eligibility and also when it denies parole to explain its reasons?

MR. SMITH: That's right. But again, I would

suggest that for this case to be litigated on the merits of what amount of process is due, the issue would expand beyond a mere explanation and greater detail of the reason.

There may be other hearings, for example, access to files or perhaps whether or not notice of hearings is timely given, matters of those kinds that are not directly mentioned or referred to in the complaint but which nonetheless might well become an issue before the district court.

QUESTION: General Smith, would you tell me precisely why you think that the discretion conferred upon your prison officials is greater and therefore the expectation of release is less in this case than it was in Greenholtz? I mean, Greenholtz had some pretty flabby language too.

It said the Board of Paroles shall order release unless it is of the opinion that release should be deferred because A, substantial risk he shall not conform to the conditions of parole. Well, that's not too bad.

B, his release would depreciate the seriousness of his crime or promote disrespect for the law. Well, you know, that's not a very tight condition.

Or, C, his release would have a substantially

adverse effect on institutional discipline.

Or, D, his continued correctional treatment will substantially enhance his capacity to lead a law-abiding life when released at a later date.

You could drive a truck through those things, couldn't you? Does somebody really say he could count on being released in Greenholtz, and why is your system conferring any more discretion than that did?

MR. SMITH: Your Honor, the statutory construct in the Nebraska statute in Greenholtz stated that a prisoner shall be released unless the Nebraska Board of Parole determined that one of four statutory criteria for deferral existed. There was, therefore, a presumptive right absent an affirmative finding by the Nebraska Board to parole release.

Under our statute there is no presumptive right to parole release because at all times the inmate is required to justify his eligibility for release consistently with the criteria under the statute.

QUESTION: Why is that, because of the "unless"? I mean, instead of using "unless" all your statute does is use "subject to."

In Nebraska it said, "He shall be released unless." Your statute says, "subject to the following restrictions the Board shall release." I don't see a

whole lot of difference between saying, "You shall do it unless," or "subject to these restrictions you shall do it."

It seems to me to be the same thing.

MR. SMITH: The principal difference is a difference which the court of appeals has noted, is that there is under the Nebraska statute, again a presumptive right to release simply upon fulfilling certain minimum eligibility requirements under Nebraska law. Those requirements also relate to time of incarceration.

I would respectfully submit that the difference between the Nebraska law and not only the Montana statute but virtually every -- a large majority of parole statutes in this country which contain release criteria comparable or almost identical to those in the Montana law, lies not in the amount of discretion which is given to the parole decision makers, but in the unique -- as the Court put it in Greenholtz -- structure and laguage of the Nebraska statute which in essence created a presumptive right subject to the feasance in favor of parole release.

I would further note that there was an absence in the Greenholtz case, and it was noted in the majority opinion, of any relevant state decisional authority construing the scope of an inmate's entitlement or

interest under the Nebraska statute. None was cited in the briefs before the Court and none, of course, was cited in the Court's opinion itself.

Montana, on the other hand, has through the series of decisions that I have made reference to, consistently construed parole release under our statute as a matter of grace or privilege and not of right. So, there are both technical differences in the construct of the language between the statutes and existing state authority construing the scope of the right under that statute that distinguish this case meaningfully, we believe, from Greenholtz.

In conclusion I would simply note that because the question which we believe must be answered in this case is whether our statute creates a reasonable expectation of parole release. The respondents' suggestion that any statute which imposes substantial limitations on a decision maker's discretion would essentially eviscerate the first holding in Greenholtz which was that the mere existence of a right to parole release does not give rise to a protected interest.

It seems quite obvious that the respondents are uncomfortable with the well-established standard and that as a consequence they have been forced into the position of arguing the creation of a new standard. We

believe that standard is inappropriate in a prison system setting and we urge that the court of appeals' judgment be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith. We will hear now from you, Mr. Pevar.

ORAL ARGUMENT OF STEPHEN L. PEVAR

ON BEHALF OF THE RESPONDENTS

MR. PEVAR: Mr. Chief Justice, and may it please the Court:

The constitutional principle that governs this case has been well established by the Court. The Court has decided at least a dozen protected liberty interest cases and in every case the Court used the very same analysis to determine whether a protected liberty interest exists.

In essence, that analysis requires the asking of a single question: is agency discretion limited by a mandatory standard, or is agency discretion unlimited. In every case in which agency discretion was limited by a mandatory standard, this Court has voted nine to nothing that the state therefore had created a protected liberty interest.

Greenholtz, Enomoto, Hewitt, Morrissey, Wolff, were all unanimous decisions on that point.

QUESTION: What if the parole statute just

says, "You shall" -- to the Board -- "You shall parole whenever you feel like granting a parole"?

MR. PEVAR: Justice White, that's essentially the Dumschat case, and this Court held that there was no protected interest.

QUESTION: And even though the statute purports to order the Board to either feel like it or not to feel like it?

MR. PEVAR: The statute in Dumschat, Your Honor, was essentially that, that the Connecticut Board of Pardons shall have the power to grant parole. There were no criteria and no standards set forth.

QUESTION: Well, in my example there is, it's when you feel like it.

MR. PEVAR: That would be --

QUESTION: A mandatory standard.

MR. PEVAR: I'm sorry?

QUESTION: Isn't that a mandatory standard, you hae to decide you don't feel like it?

MR. PEVAR: Your Honor, essentially your hypothetical is very similar to the way that the statute was in --

QUESTION: How about if the statute says that you grant parole whenever you feel it's in the public interest?

MR. PEVAR: That's a standard. In fact, the Securities Act authorizes the SEC to act and to decide instances in the public interest. That, like th Montana Parole Bord --

QUESTION: The statute says, whenever in your uncontrolled discretion you decide that it's in the public interest.

MR. PEVAR: That would be a less favorable case than our case here. Our statute says, you shall grant parole, and Justice Scalia mentioned some very key language there, subject to --

QUESTION: What if the statute says, within two months after the filing of an application for parole you shall decide whether you feel like it or not and the Board just never -- just never does anything. There the application lies. There has never been an action on it.

Is there a liberty interest to the extent that you may require the Board to act, under federal law?

MR. PEVAR: And as I understand your question, the only criteria is that --

QUESTION: When you feel like it?

MR. PEVAR: When you feel like it. I would say probably not, under the decisions of this Court.

QUESTION: No liberty interest even though the statute says, you have to decide whether or not to grant

within two months?

MR. PEVAR: Yes, I would analogize that to the Dumschat case. In Dumschat the statute was, you shall have the power to grant parole, and this Court held that merely having the power to do something, unfettered, without any standards to guide the decision maker.

QUESTION: And you are hinging your case upon the clear distinction between that, and that is do it when you feel like it, and do it only when it's in the best interests of society?

MR. PEVAR: That's correct. Well, actually --

QUESTION: That's a real limitation upon somebody's discretion?

MR. PEVAR: The statute is, as you read it, Justice Scalia, starts out by saying, "Subject to the following restrictions the Board shall grant parole," and then the statute proceeds to list three restrictions on that power.

QUESTION: "Parole shall be ordered only for the best interests of society."

MR. PEVAR: That's the second restriction.

QUESTION: And each of them as to be satisfied?

MR. PEVAR: And each of them has to be satisfied..

QUESTION: So, it's really just a question of

how the statute is phrased, in a sense. If these weren't phrased as restrictions but it simply said, "The Board shall grant parole when it finds that it is in the best interests of society, that is no liberty interest?

MR. PEVAR: No, that would be a liberty interest.

QUESTION: Then any parole statute in the real world is going to confer a liberty interest?

MR. PEVAR: No. For example, the parole statute that Montana had initially would not. That parole statute said that the Board may grant parole subject to the conditions it deemed expedient.

Montana 1955 drastically eliminated -- or revised that and imposed three restrictions on the Board. The Legislature obviously intended to restrict their power and they are refusing to recognize that fact.

There is a vast difference --

QUESTION: Well, of course the place to litigate that would be in the state court, whether they are failing to follow the commands of the state statute.

MR. PEVAR: Under this Court's decision, particularly Hewitt versus Helms which the Chief Justice wrote for the Court, the Court has established the principle that where you have mandatory language ordering an agency that it shall or must do something,

combined with a standard, a limitation that creates a federal protected liberty interest.

QUESTION: The language in Hewitt against Helms is a good deal different than the language here. It was a good deal more precise, don't you think? There was nothing about the public interest or the interest of society.

MR. PEVAR: Your Honor, there were two standards that this Court cited in Hewitt. One was the need for control and the other was a serious threat to institutional security.

I believe that those were the two standards. I don't feel that those standards are any more specific than my standards. However, the critical point in this is not how broad the standards are but whether there are any standards.

There is an enormous constitutional distinction between having broad standards and having no standards.

QUESTION: Do you remember the Schecter case, the only case in which this Court has ever struck down a delegation to executive authority on the basis that it was delegation of legislative powers? Do you think that -- I forget what the language of the delegation was there. It essentially let the President do whatever he

wanted with the economy, but it might have said the President can do whatever he wants to the economy but only if it is in the best interests of society.

Do you think that that would have been enough to save Schecter if it said that?

MR. PEVAR: Not under the rulings of this Court.

QUESTION: Which would mean it really is not any control over discretion at all simply to say, "the best interests of society"?

MR. PEVAR: Meaning it is a control over discretion.

QUESTION: You think Schechter would have come out the other way if it had only said that the President has to act in the best interests of society?

MR. PEVAR: What I am saying is that under the rulings of this Court, it is clear that as soon as you impose that kind of standard on an administrative agency and they must come to a finding that --

QUESTION: And Schechter would have come out the other way? I am asking about Schechter. If Shechter had had that standard that would have been enough to do the trick?

MR. PEVAR: Yes, it would have. What this Court has stated in --

QUESTION: I thought the President had taken an oath under the Constitution to act in the best interests of society anyway, more or less.

MR. PEVAR: What this Court has required in administrative law is an intelligible principle. For example, what is restraint of trade? What is unfair competition?

Legislatures make these kinds of delegations to quasi-administrative agencies all the time. This is exactly what has occurred here. The Montana Legislature has decided to confer on this administrative agency the power and the duty to grant parole and it has set forth three restrictions on that power.

As soon as it has limited the discretion of te agency under federal law, that creates a protected liberty interest.

QUESTION: Well, I would have thought there might -- the issue might turn on the degree to which discretion is limited, and your interpretation goes to the outer limits of that and says that virtually any language at all constitutes enough limit on discretion to trigger constitutional rights and it certainly would be reasonable to take a different view of that and say there has to be some meaningful limit to discretion before a liberty interest is triggered.

MR. PEVAR: Justice O'Connor, I would agree with that, and the word that I used is a word that I borrowed from Supreme Court decisions, that there has to be an intelligible principle. However, this Court for very obvious and good reasons has not delved into whether a restriction is a massive restriction or a less massive restriction because essentially, what that boils down to is an interpretation of state law.

For example, finishing a question that Justice Scalia had asked me, is that in this case, because Montana -- the Montana Legislature has decided to use this particular language it is up to the Montana courts to decide what is in the public interest in Montana.

It is up to the Montana courts to decide when the release of a prisoner would be to the detriment of the prisoner or the community.

QUESTION: Well, then maybe we ought to have a pullman abstention here, or a certification back to the Montana courts. Why are we involved in it?

MR. PEVAR: For the same reason that this Court went ahead in Greenholtz, because all that is necessary is to determine if there is a limitation and not how massive that limitation is, because that would immediately get this Court into interpreting state law.

Ths Court's duty ends, and responsibility to

interpret these statutes, begins and ends with determining whether the state has placed a limitation on agency discretion. This is what this Court decided in Lowdermill also.

QUESTION: Not a meaningful limitation on discretion, just any --

MR. PEVAR: No, I would agree with Your Honor. Any meaningful limitation, in other words, not a limitation, "whenever you feel like it."

QUESTION: Well, what about whenever you think the applicant deserves it?

MR. PEVAR: That also would be a more difficult case than we have here.

QUESTION: I know, but is it a liberty interest or not? Is there any -- that's just any -- that is a standard, isn't it?

MR. PEVAR: Yes, I would agree with you, it is. In other words they would have to explain to the inmate why he or she did not deserve it.

QUESTION: All they have to do, though, is -- they don't need to explain it to them. They just say, "We don't think you deserve it."

MR. PEVAR: Not unless there is aprotected liberty interest. Then, under Greenholtz -- Greenholtz did decide the question of what processes do, a question

that is not reached in this case. The Chief Justice asked my opponent about that.

We have not --

QUESTION: A statute that just doesn't give any standards other than "deserves." If you feel he deserves it, do it. If you don't, don't do it.

MR. PEVAR: I would say that that created a protected liberty interest. It would not be as clear as in this case, however.

There ae two points that are very compelling here.

QUESTION: Do you think a statute says, parole a fellow whenever you feel like it, but within two months you have to tell him that you've denied it and you must explain why you feel that you are not going to grant parole.

Now, is that a liberty interest?

MR. PEVAR: I would also say it is a liberty interest.

QUESTION: Even though the only standard is whether you feel like it or not?

MR. PEVAR: Especially if you tagged on something that's very --

QUESTION: Yes, I did, exactly.

MR. PEVAR: -- in which you have to explain

because that tells the agency that there is a requirement. Like here, the Montana Legislature has authorized judicial review. That indicates that the Montana Legislature obviously anticipated that there would be findings that there are meaningful restrictions.

Otherwise, judicial review would make no sense.

QUESTION: You are creating a quite different theory of law. You are saying it doesn't matter whether you have bee deprived of any liberty or property within the meaning of the Constitution. If you are given a precedural right by statute you have an entitlement to that procedural right.

That's basically what you're arguing; it doesn't matter whether you have really been deprived of liberty or not. Whatever procedural rights the statute gives you, you are entitled to?

MR. PEVAR: No.

QUESTION: No?

MR. PEVAR: And this Court has rejected that. It is not sufficient to trigger the due process clause that a state simply establish procedures, and I am not arguing that.

QUESTION: We should consult the Supreme Court of the State as to how much discretion there is. Couldn't we consult the regulations that have been

issued?

MR. PEVAR: Yes, we can.

QUESTION: The regulations say, Section 20.25.505, Criteria for Parole Grant Decisions: "In making its determination regarding the committed offender's release the Board shall take into account each of the following factors." Then it lists however many down to "N" is, and "N" is "Any other factors the Board determines to be relevant.

Any other factors?

MR. PEVAR: That's right, and that is appendixed to the Greenholtz decision. Those were the same factors that are contained in the model penal code that Nebraska adopted and this Court, nine to nothing, held that those criteria were adequate to establish a protected liberty interest.

That is one of my arguments. In other words, the Montana Board has gone ahead on its own and given substance to this as administrative agencies must, and they have adopted the same standards that Nebraska did that were reviewed by this Court in Greenholtz.

QUESTION: How could they have gone further than to say, any other factors? I mean, make believe you are charged and they say, you know -- the Attorney General calls you in and says, "Pevar, get me the

broadest discretion I can."

Could you do any better than to say, "Any other factors you consider relevant"?

MR. PEVAR: No, but the critical distinction, Justice Scalia, is this: the Board is allowed under this to consider everything it considers relevant, but once it reaches an opinion its discretion ends. If it reaches an opinion that the release of Prisoner "X" would be a detriment to the community, it must deny parole.

Its discretion does not extend further than that. On the other hand, if it reaches the opinion that the release of Prisoner "X" would not be a detriment to the community or to Prisoner "X" it must grant parole. It is allowed to consider whatever it feels necessary to reach that opinion.

The legislative history here is exceedingly important and it offers irresistible proof that the Montana legislature wanted to impose restrictions on this Board. It took a statute in existence in that state for over 40 years that was filled with unfettered discretion, and it replaced it with a statute that has the word "shall" and three specific restrictions.

QUESTION: Mr. Pevar, if you are that confident about Montana law, why didn't you bring this

action in the state court where you could have gotten a decision of the Montana Supreme Court, probably in your favor from what you have said?

MR. PEVAR: I was aware at the time that I filed this lawsuit about a previous decision from the Montana Federal District Court, the Campbell decision which was a one-paragraph decision. It was brought pro se by a prisoner and the Federal District Court there held that the Montana statute created no protected interest.

I knew that I was against that decision and I filed --

QUESTION: Would the Supreme Court of Montana have been bound by the Federal District Court?

MR. PEVAR: No -- well, the issue here is a federal issue.

QUESTION: Well, but what you want is certain procedures or benefits for people who were denied parole, and from what you say the Montana statute would give these, quite obviously. So, wouldn't the Supreme Court of Montana have ruled in your -- given you as much as you could get from a federal court?

MR. PEVAR: Yes, I believe that if I brought this in Montana I would get the same relief that I am hoping to get here. What I am asking for here is

nothing more than what the Supreme Court gave to the prisoners in Nebraska, and I do believe the Nebraska statute and the Montana statute are legally indistinguishable.

This lawsuit does not seek the release of anyone, nor does it seek to restrict the paroling policies of the State of Montana. It seeks only to ensure that the standards that the Montana Legislature wanted to impose on this administrative agency are actually implemented.

The standards that are set forth, the restrictions that are set forth in the statute and the statute -- let me back up a second. In the 1955 Act the title begins that, we are now conferring the power on the Parole Board to grant parole within restrictions.

That same cricial word "restrictions" is then carried forth into this parole statute. And the parole statute begins, "Subject to the following restrictions, the Parole Board shall grant parole," and then it lists three restrictions.

Those restrictions are certainly not any less broad than the restrictions and that the limitations that this Court has in five nine-to-nothing decisions recognized, that they create a protected liberty interest.

The standards in Vitek, for example, were that placing -- or transferring an inmate to a mental hospital, first of all the statute there said "may," and then the only criteria was that it will endanger the public safety. And the Court said that that created a protected liberty interest.

What is crucial here is that their hands are tied. There is a limit to the outer reaches of their discretion. They cannot deny parole for any reason that they want to, and they must grant parole in a certain situation.

Indeed, counsel conceded that crucial point. He conceded when he was up here that if the Board finds that A, B, and C, the three restrictions set forth in the statute, are met the prisoner must be granted parole.

That is our case. That is all we are asking this Court to find. Because under this Court's decisions those prisoners, therefore, have a legitimate expectation of release and that is what this Court found in Greenholtz.

Unless there are further questions, I have completed my presentation.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pevar.

Mr. Smith, you have three minutes remaining.

ORAL ARGUMENT OF CLAY R. SMITH, ESQ.

ON BEHALF OF PETITIONERS - REBUTTAL

MR. SMITH: There are just three points I would like to cover in my reply argument. First, as Justice Scalia pointed out, through its regulations, specifically in Section 20.25.505, the Montana Board has adopted many of the criteria, in fact all the criteria contained in the Model Penal Code with respect to determining parole release applications.

There are, however, two critical differences. In the introductory paragraph in that section the word "shall" has been changed to "may" so that, the Board may order parole unless it determines that one of the reasons for deferral does not exist.

Then secondly, it has added Subsection "M," any other relevant reason, which does not appear in the Model Penal Code. It did, however, appear in the Nebraska statute.

QUESTION: Is that, and any relevant reason may be used to deny or to grant parole?

MR. SMITH: Presumably both.

QUESTION: Because I thought you said, it may grant parole for any of the following reasons, "A" to "M" and then it added, "for any other relevant reason."

MR. SMITH: The administrative regulation states that the Board may grant parole unless it

determines that one of four reasons for --

QUESTION: Are the "A" to "M" reasons for granting or reasons for denying?

MR. SMITH: Well, in the second section of that portion it lists various factors which may be considered by the Board in determining whether to defer or to grant release and the last of those factors is factor "M" and it states, "any other relevant reason."

In conclusion, I would simply note that the proposed standard suggested for resolving this case by the respondents is in fact no standard whatsoever. It is a standard which essentially repudiates the reasoning of the Court's prisoner entitlement cases beginning with the 1974 decision in Wolff versus McDonald.

It leaves state decision makers, if adopted, in the quandary of determining at best fine and at worst almost metaphysical questions concerning the degree of discretion that exists under a particular state statute. It is a standard which is not workable. It is a standard which bears no support from previous decisions of this Court and it is a standard which we respectfully submit should not be adopted.

QUESTION: May I ask just this, General Smith. In your view did the 1055 statute change the law in any respect, or was it just precatory?

MR. SMITH: I think the '55 law changed the procedures and the substantive law significantly. I would simply note that the term, "subject to restrictions," works both ways and for example --

QUESTION: Do you think it increased or decreased the amount of discretion in the Parole Board?

MR. SMITH: I believe it had no measurable impact on the discretion of the Parole Board since presumably it will make its decision based on the facts and the criteria are so broad as to allow it to make its decision on any factor it deems --

QUESTION: You earlier said you thought it was a substantial change in the law. Now, you say it was really no change.

MR. SMITH: It was a substantial change in the law because it imposed various procedures and it set forth --

QUESTION: Purely procedure, no change in the substantive criteria, though?

MR. SMITH: Well, to the extent that it required the Board to determine that, for example, a prisoner's release was in the best interests of society, I suppose under prior law it could have determined that a release was not in the best interests of society but the prison was too overcrowded so it was going to

release the prisoner anyway.

Under the new law, of course, that discretion is minimized, so there may have been some incremental change in discretion but it certainly bears no logical relationship to whether the statute creates a reasonable expectation of release. That, we believe, is the controlling standard in this case, Your Honor.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.

The case is submitted.

(Whereupon, at 10:51 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#86-461 - BOARD OF PARDONS AND HENRY BURGESS, Petitioner V.

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BY Paul A. Richardson

(REPORTER)