In the Supreme Court of the United States

GARY SWARTHOUT, *Petitioner,*

v.

DAMON COOKE, *Respondent.*

MATTHEW CATE, *Petitioner,*

v.

ELIJAH CLAY, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may grant habeas corpus relief to a state prisoner based on its view that the state court erred in applying the state-law standard of evidentiary sufficiency governing state parole decisions.

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Gary Swarthout, the Warden at California State Prison, Solano, and Matthew Cate, the Secretary of the California Department of Corrections and Rehabilitation, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.[1]

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit Court of Appeals, reversing the judgment of the district court and remanding with instructions to grant respondent Damon Cooke the writ of habeas corpus, is reported as *Cooke* v. *Solis*, 606 F.3d 1206 (9th Cir. 2010). The decision of the United States District Court for the Northern District of California, denying habeas corpus relief, is unreported. The rulings of the state superior court, the California Court of Appeal, and the California Supreme Court, all denying state habeas corpus relief and upholding the Board of Prison Terms'[2] denial of parole, are unreported.

The memorandum decision of the Ninth Circuit Court of Appeals, affirming the judgment of the district court granting respondent Elijah Clay the

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[1] Cooke is currently in Warden Swarthout's custody and Clay is currently in Secretary Cate's constructive custody; therefore, Swarthout and Cate, rather than the wardens who had custody during the pendency of the underlying proceedings, are named as the petitioners.

[2] The Board of Prison Terms was renamed in 2005 to the Board of Parole Hearings. Cal. Penal Code § 5075(a). Because the Board issued the underlying parole decision in this case before 2005, this petition refers to the Board as the Board of Prison Terms.

writ of habeas corpus, is unreported. The decision of the United States District Court for the Central District of California is also unreported. The rulings of the state superior court, the California Court of Appeal, and the California Supreme Court, all denying state habeas corpus relief and upholding the Governor's denial of parole, are unreported.

Each is reproduced in the Appendix. App. 1a, 26a, 42a-44a., 64a, 68a, 100a, 104a, 109a-110a.

STATEMENT OF JURISDICTION

As to respondent Cooke, the judgment of the court of appeals was filed on June 4, 2010. App. 1a. The court issued its mandate simultaneously with the opinion; and, on July 19, 2010, the court denied the State's motion to recall the mandate and stay enforcement of relief. App. 46a-48a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

As to respondent Clay, the judgment of the court of appeals was filed on June 18, 2010. App. 64a. The court issued its mandate on July 12, 2010. App. 111a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits

> in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Introduction

In *In re Rosenkrantz*, 29 Cal. 4th 616 (2002), and *In re Dannenberg*, 34 Cal. 4th 1061 (2005), the California Supreme Court held, as a matter of state law, that state courts may review, for "some evidence," decisions rendered by the Governor or the Board of Prison Terms denying parole to state prisoners sentenced to prison for life. Later, in *In re Lawrence*, 44 Cal. 4th 1181 (2008), and *In re Shaputis*, 44 Cal. 4th 1241 (2008), the California Supreme Court further explained, again under state law, that "the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because *he or she currently is dangerous*." 44 Cal. 4th at 1191 (emphasis added); see also 44 Cal. 4th at 1254. Next, in *Hayward* v. *Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), the Ninth Circuit held that, in light of *Lawrence* and *Shaputis*, the federal habeas court may review, under 28 U.S.C. § 2254, "whether the California judicial decision approving

the [parole authority's] decision rejecting parole was an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence.'" *Hayward*, 603 F.3d at 563.

In the two cases involved in this consolidated petition, the Ninth Circuit found no sufficient evidence of current dangerousness under state law to support the denial of parole, and held that the state court decisions upholding the denial of parole to respondents Cooke and Clay were "unreasonable" under 28 U.S.C. § 2254(d). The court, therefore, granted them habeas corpus relief. The issue presented is whether 28 U.S.C. § 2254 permits the federal court to grant habeas corpus relief based on second-guessing the state court's application of the state-law standard of judicial review governing state parole decisions.

Respondent Cooke's Case

1. State Parole Proceedings

Respondent Damon Cooke was sentenced in a California court to an indeterminate term of seven years to life in prison with the possibility of parole following his 1991 conviction for attempted murder with the use of a firearm. In 2002, the California Board of Prison Terms concluded, based on state regulatory factors, that Cooke was not suitable for parole and that his release would pose an unreasonable risk of danger to society. Its decision was based on Cooke's commitment offense, his failure to fully participate in self-help and therapy programs, his failure to develop a marketable skill,

three incidents of misconduct in prison, and negative aspects of his most recent psychological report. App. 49a-60a.

2. State Court Proceedings

Cooke filed a petition for writ of habeas corpus in the state superior court. He argued that the Board's decision was arbitrary and capricious in violation of his state and federal due process rights because the facts of his commitment offense after so many years no longer amounted to even a modicum of evidence that he was a current threat to society. The court denied the petition, explaining that "the record submitted by [Cooke] does not support [Cooke's] claims that his Constitutional and statutory rights were violated by the [Board]. The record indicates that there was some evidence, including but certainly not limited to the life offense, to support the board's denial of [Cooke's] parole." App. 42a.

Cooke filed a petition for writ of habeas corpus in the California Court of Appeal. That court summarily denied the petition. Cooke then filed a petition for direct appellate review, also raising the same claims, in the California Supreme Court. That court denied review. App. 43a, 44a.

3. Federal Habeas Corpus Proceedings

a. Cooke next filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging the Board's denial of parole on the grounds that the state courts violated his constitutional rights in their application of the state "some-evidence" standard and alleging the Board violated his due process rights in

various other ways. The district court denied the petition, concluding that Cooke's due process rights were satisfied; he was provided an opportunity to be heard, was informed why he was unsuitable for parole, and some evidence supported the Board's decision. App. 26a-40a.

b. In a published opinion authored by Judge Reinhardt, a three-judge panel of the Ninth Circuit reversed. App. 1a-25a. Inquiring into the "nature and scope of the federally enforceable liberty interest created by California's 'some evidence' requirement," the panel held that "California's 'some evidence' requirement is a component of the liberty interest created by the parole system of that state." App. 18a. And, invoking the en banc *Hayward* opinion, the panel posed the question as "whether the decision of the Alameda County Superior Court was an unreasonable application of California's 'some evidence' requirement . . . ." App. 18a.

The panel, relying on an erroneous interpretation of state law, determined that the crime could not support the denial of parole. The panel then took it upon itself to independently "examine each of the Board's other stated reasons for denying parole." App. 20-21a. Further, although the Board had determined that Cooke's prison disciplinary history supported denial of parole, App. 49a-60a, the panel independently judged Cooke's violations to have been merely "minor and non-violent" remote occurrences. App. 21a. Similarly, the panel rejected, as a "bare assertion," the Board's finding that without further therapy and programming to cope with stress and to understand the factors leading to the crime, Cooke would continue to be "unpredictable" and a "threat to others." App. 22a. The panel also discounted the Board's determination that Cooke needed to learn a

trade; after recounting positive information about Cooke, the panel asserted that Cooke's certification in a trade would have no benefit and would not "render him non-dangerous." App. 23a. The panel therefore opined that "nothing in the record supports the state court's finding that there was 'some evidence' in addition to the circumstances of the commitment offense to support the Board's denial of [Cooke's] parole." App. 24a. Based on this reweighing of the evidence, the panel held that "the state court decision was 'based on an unreasonable determination of the facts in light of the evidence'. *Hayward*, 603 F.3d at 563 (quoting 28 U.S.C. § 2254(d)(2))." App 24a.

The panel remanded the matter to the district court with instructions to grant the writ. App. 24a. On June 24, 2010, the district court granted the writ and ordered the Board to hold a new hearing to reevaluate Cooke's suitability for parole in accordance with the Ninth Circuit's decision.[3] App. 61a.

Respondent Clay's Case

1. State Parole Proceedings

Respondent Elijah Clay was sentenced in California to a prison term of seven years to life with the possibility of parole based on a 1978 conviction for first-degree murder. In 2003, the Board of Prison

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[3] Although not in the record, the State can report that Cooke's court-ordered hearing was held on August 19, 2010, and parole was denied. The district court, however, is currently considering Cooke's motion to alter or amend the judgment to provide for his immediate release from custody.

Terms found Clay suitable for parole and reversed the Board's decision. The Governor, however, exercised his right to review the Board's decision and on April 30, 2003, he found Clay unsuitable for parole. App. 114a. The Governor cited the gravity of Clay's crime, Clay's failure to adequately participate in self-help programs to explore and address the causative factors for his participation in the commitment offense, his unrealistic parole plans, and his extensive criminal history – consisting of numerous robberies and a prior prison term. App. 112a.

2. State Court Proceedings

Clay filed a petition for writ of habeas corpus in the state superior court. He argued that he was denied due process because the Governor's decision was not supported by some evidence or any reliable information to support a reversal of the Board's parole grant. After recounting the evidence on which the Governor had relied, the court determined that the Governor's conclusions were supported by some evidence. App. 104a.

Clay filed a petition for writ of habeas corpus in the California Court of Appeal. That court summarily denied the petition. He then filed a petition for direct appellate review, also raising the same claims, in the California Supreme Court. That court denied review. App. 109a-110a.

3. Federal Habeas Corpus Proceedings

a. Clay next filed a federal petition for writ of habeas corpus alleging, among other things, that his due process rights were violated because the

Governor's decision was not supported by "some evidence." The district court specifically found that Clay received all the procedural protections required by *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Nonetheless, the court granted the petition on the grounds that, because of the passage of time, continued reliance on Clay's commitment offense as a reason to deny parole violated due process, and the remaining factors the Governor relied on were "not supported by some evidence with an indicia of reliability." App. 68a, 100a.

The district court therefore concluded that "the state court's [denial of the petition] was based upon an unreasonable determination of the facts in light of the evidence presented during the parole hearing and amounted to an unreasonable application of clearly established Supreme Court precedent." App. 97a. The district court ordered the warden to set a parole release date in accordance with the Board of Prison Terms' prior determination finding petitioner suitable for parole, and release petitioner on parole if that date has passed, within thirty days. App. 98a-99a.

b. The State appealed and sought a stay of the district court's order. The Ninth Circuit initially granted the stay but later vacated it. The State sought an emergency stay in this Court. Justice Kennedy denied the State's request. App 119a. Accordingly, under compulsion of the district court's writ, the State released Clay from prison in June 2008.

Subsequently, in an unpublished memorandum decision, a three-judge panel of the Ninth Circuit affirmed the district court's judgment granting habeas corpus relief. The panel asserted that Clay's

commitment offense of first-degree murder "is no longer probative" and that Clay's criminal history of misdemeanors and numerous robberies "is unremarkable." App. 67a. And, discounting the remaining factors on which the Governor had relied, the panel claimed that Clay had participated in "sufficient" programming and that he had "adequate" parole plans. App. 67a. Explaining that, "*as a matter of California state law*, 'some evidence' of future dangerousness is essential for the denial of parole," the panel concluded that "here, there is no evidence in the record that would indicate that Clay poses a danger to the community if released." App. 66a (emphasis added). Based on this reweighing of the evidence, the panel held that "the Los Angeles Superior Court's decision . . . was an unreasonable application of California's 'some evidence' rule and was an unreasonable determination of the facts in light of the evidence presented. *Hayward*, 603 F.3d at 562-63; 28 U.S.C. § 2254(d)(1) and (2)." App. 67a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decisions raise profound issues of comity and habeas corpus jurisdiction. In interfering on the substantive question of a prisoner's suitability for parole, the Ninth Circuit decisions strike at the heart of the State's special police powers.

In arriving at its indefensible decision to second-guess the State parole decisions, the Ninth Circuit violated any number of federalism principles. In second-guessing the state courts on their application of the *Rosenkrantz/Lawrence* "some evidence" test, the Ninth Circuit invaded the exclusive province of the state judiciary. And, in granting habeas corpus

relief on a novel procedural due process theory, the Ninth Circuit once again transgressed basic limits on its habeas corpus powers.

Further, the Ninth Circuit decisions will exert these harmful effects in numerous cases posing significant threats to public safety. Based on the Ninth Circuit's decisions, over 23,000 prisoners serving indeterminate life sentences in California will be eligible to enlist the federal court to sit as an additional arbiter of their parole suitability. Indeed, since 2008 over 1,500 district court petitions involving sufficiency-of-evidence challenges to California parole decisions and roughly 400 similar appeals in the Ninth Circuit have been filed. In the four months since *Hayward*, the federal courts already have invalidated twenty-six state parole decisions that the state courts had approved.

Moreover, the federal review the Ninth Circuit's authority provides to life prisoners is an unnecessary and duplicative review, for mere reasonableness, of the state court's application of a minimal "some evidence" test in at least one and as many as three levels of state judicial review.

1. The Ninth Circuit's decisions conflict with this Court's precedents recognizing the State's authority over parole-suitability determinations.

The Ninth Circuit's decisions—in Cooke's case, in Clay's case, and in *Hayward*—are directly at odds with this Court's precedent and the notion that parole is inherently a state process. As this Court has explained, "we have long been adverse to imposing federal requirements upon the parole systems of the States." *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 369 (1998); see also *Morrissey* v.

Brewer, 408 U.S. 471, 490 (1972). "Our system of federalism encourages . . . state experimentation" in developing methods of determining parole suitability. *Greenholtz*, 442 U.S. at 13. And, as this Court has recognized, state parole determinations should not be "encumbered by procedures that states regard as burdensome and unwarranted," as that may provide incentive for states to abandon or curtail parole. *Id.* Indeed, states have "no duty" to establish a system of parole, because "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7. If a State chooses to establish a parole system, the State retains wide latitude in "defining the conditions for release and the factors that should be considered by the parole authority." *Id.* at 8.

State authorities, rather than federal courts, have expertise in making the predicative assessment of whether a given individual should be released into the community, and their parole decisions are an integral part of the State's overall administration of its system of corrections. "[B]eyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon* v. *Ice*, 129 S. Ct. 711, 718 (2009). Federal courts "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977). "The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner* v. *Jones*, 529 U.S. 244, 252 (2000).

This Court has never authorized federal habeas corpus relief for insufficiency of evidence supporting a State's determination that a prisoner is unsuitable

for parole under state-law criteria. Federal courts should not be drawn into the administration of the State's parole system or its individual parole decisions. To do so, as the Ninth Circuit has done here, the federal court must second-guess the State's parole authority, as well as the State's judiciary. The Ninth Circuit's intrusion into the State's parole decisions compromises important principles of federalism and inappropriately installs the federal judiciary as the final arbiter of an exclusive state function.

2. The Ninth Circuit's inappropriate intrusion into the state parole system rests on multiple violations of federalism and comity principles.

It is not surprising that, on its way to reaching the dubious result of second-guessing state parole decisions, the Ninth Circuit violated any number of traditional federalism principles. It "bootstrapped" a state-law standard of judicial review and untenably transformed it into a "liberty interest" protected by federal due process. It improperly intruded itself into second-guessing the state court's applications of state law. It placed burdens on the administration of state parole that exceeded the limits this Court laid down in *Greenholtz*. And, once again, it failed to abide by the standard requiring deferential review of state court judgments mandated by 28 U.S.C. § 2254. Each of these would warrant certiorari review by itself. That the Ninth Circuit committed such violations in seeking to justify the improbable result of its *Cooke* and *Clay* decisions further underscores the need for this Court's intervention by certiorari.

The Ninth Circuit's decisions unjustifiably transform a state evidentiary standard into a "liberty interest"

As if it somehow could support federal review of the substantive merits of a state parole-suitability decision, the Ninth Circuit held that California's standard of judicial review—for some evidence—is a component of a prisoner's liberty interest: It stated, "California's 'some evidence' requirement is a component of the liberty interest created by the parole system of that state." App. 18a.

But this holding is at odds with this Court's recognition that:

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Olim v. *Wakinekona*, 461 U.S. 238, 250-51 (1983). Thus, "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Id.* at n.12.

The Ninth Circuit's approach further conflicts with that of other circuits. See, *e.g.*, *Brandon* v. *Dist. of Columbia Bd. of Parole*, 823 F.2d 644, 648 (D.C. Cir. 1987) ("Courts have explicitly and repeatedly rejected the proposition that an individual has an interest in a state-created procedural device, such as a hearing, that is entitled to constitutional due

process protection. . . . [T]he mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive liberty interests entitled to federal constitutional protection under the Due Process Clause."); *Shango* v. *Jurich*, 681 F.2d 1091, 1100-01 (7th Cir. 1982) ("The argument that the procedures established by the regulations can themselves be considered a liberty interest is analytically indefensible."). *Cooke* and *Clay*, that is, may well have been decided differently in those circuits. This Court should intervene to assure consistency in the law in this area.

The Ninth Circuit's approach, confusing "liberty interest" with process, also threatens to elevate a dispute about any state procedure into a federal constitutional question. As this Court has long recognized, that would be an absurdity. See *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982); *Beck* v. *Washington*, 369 U.S. 541, 554-55 (1961); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1947). Constitutionalizing every state procedural right would stand any federal due-process analysis on its head.

Procedural due process questions are analyzed "in two steps: the first asks whether there exists a liberty . . . interest which has been interfered with by the State . . .; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dept. of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1980). However, instead of identifying any liberty interest at stake and then identifying the process due before the individual can be deprived of that interest, the Ninth Circuit views the process as a substantive end in itself.

A prisoner's interest, if any, is in parole release, not in the procedures the State affords prisoners to protect against an arbitrary deprivation of that interest. See *Olim*, 461 U.S. at 250-51. Even on that point, it is questionable whether a California life prisoner has a constitutionally protected entitlement in parole release. The criteria for ascertaining whether such an interest exists are themselves uncertain. This Court in *Greenholtz*, 442 U.S. at 12, treated the question as one of a negative inference drawn from state statutes and regulations where they compel a certain outcome based upon a certain factual showing. But, in *Sandin* v. *Connor*, 515 U.S. 472 (1995), the Court re-framed the inquiry as one focusing on whether the prisoner would suffer an "atypical and significant hardship." See *Wilkinson* v. *Austin*, 545 U.S. 209, 229 (2005) (*Sandin* abrogated *Greenholtz*'s methodology for establishing a liberty interest).

The Ninth Circuit's decisions intrude into the state courts' resolution of state-law questions

The Ninth Circuit's inappropriate assertion of authority to review the substance of state parole decisions finds no support in procedural due-process jurisprudence. To the contrary, it entangles the federal court in improper second-guessing of state-law decisions.

There is a basic difference between an alleged liberty interest created by state law and any procedural protection of that interest required under the Due Process Clause. See *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974) (liberty interest "entitle[s] [inmate] to those minimum procedures appropriate under the circumstances and required by the Due

Process Clause to insure that the state-created right is not arbitrarily abrogated"); *Austin*, 545 U.S. at 224 ("[a] liberty interest having been established, we turn to the question of what process is due"). While States may provide more protection than required by the federal Constitution, any additional standards imposed by the State do not thereby become federal constitutional protections. See *Austin*, 545 U.S. at 224; see also *Sandin*, 515 U.S. at 481-82; *California* v. *Ramos*, 463 U.S. 992, 1013-14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). Overlooking that basic difference, however, the Ninth Circuit erroneously arrogated to itself the power to enforce California's state-law "some-evidence" rule of judicial review. App. 17a, 67a.

Not only did the Ninth Circuit violate this Court's decisions distinguishing between the alleged state interest and the claimed federal process, it also violated this Court's precedents recognizing that the federal habeas court has no power to remedy perceived violations of state law. *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972) ("The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards."). The federal interest, if any, is in the adequacy of the procedures, not in the substantive correctness of the result under state law. That is a

state-law question reserved exclusively to the state courts.

The Ninth Circuit's decisions impose on the State an obligation rejected by this Court in Greenholtz

The Ninth Circuit's notion in *Cooke* and *Clay* that federal due process requires review of a state parole decision for "some evidence" is contrary to this Court's holding in *Greenholtz*. *Greenholtz* established the contours of any constitutional process "due" in a case such as this one: an opportunity to be heard and a statement of reasons why parole was denied. 442 U.S. at 16. *Greenholtz*, further, specifically recognized that "[t]he Constitution does not require more." *Id.* California provides the *Greenholtz* protections, and more. It provides life-term prisoners the right to review their prison files; appear at, and participate in, a hearing before two Board commissioners; receive a stenographic recording of the proceedings; if parole is denied, receive a written statement setting forth the reasons for the denial; and to have parole consideration hearings at regular intervals. Cal. Penal Code §§ 3041, 3041.5. Further, under California law, parole decisions are also subject to state judicial review for some evidence. As in these cases, the state process allows resort to three levels of state courts. Surely these are sufficient protections to ensure basic reliability of the process.

The Ninth Circuit's decisions fail to afford the state court adjudications the deference required by 28 U.S.C. § 2254

The Ninth Circuit's decisions to grant habeas corpus relief on parole-suitability grounds, finally, runs afoul of the deferential-review standard that strictly limits federal habeas corpus relief in cases brought by state prisoners.

Under 28 U.S.C. § 2254(d), federal habeas corpus relief "shall not be granted" on a claim adjudicated on the merits by the state court. Here, the state courts adjudicated respondent Cooke's and respondent Clay's federal claims on their merits. App. 42a, 104a.

To become eligible for relief, then, Cooke and Clay must establish an exception to § 2254(d)'s basic rule. That is, they must show that the state court's decision of the federal claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), or that the state court's rejection of an otherwise valid federal claim was based on an unreasonable determination of the facts, § 2254(a), (d)(2). "Clearly established" federal law under § 2254(d)(1) is limited to the strict holdings of this Court's precedents squarely addressing the question raised by the petitioner's claim at the time the state court rendered its decision— not "dicta" and not mere circuit-court authority. *Renico* v. *Lett*, 130 S. Ct. 1855, 1865-66 (2010); *Wright* v. *Van Patten*, 552 U.S. 120, 126 (2008) (per curiam); *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000).

This Court has "squarely addressed" the process due in a state parole proceeding only in *Greenholtz*, and there it did so only in light of the Nebraska

system. *Greenholtz* held that "the Constitution does not require more" than an opportunity to be heard and a statement of the reasons why parole was denied. *Greenholtz*, 442 U.S. at 15-16. In doing so, this Court expressly rejected the claim that evidentiary support is required in the parole context, holding instead that "nothing in the due process concepts . . . requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release." *Id.* at 15.

Here, then, it cannot be said that the state-court's decisions—even if they were "incorrect" or "unreasonable" in finding "some evidence" to support the denial of parole—violated "clearly established" law. For Cooke's and Clay's constitutional sufficiency-of-evidence claim was a novel one of a type never before endorsed by this Court as applicable to the question of parole suitability. The Ninth Circuit erred under § 2254(d) in granting relief on such a claim.

* * *

The Ninth Circuit's decision to grant habeas corpus relief based on its own view of a state prisoner's suitability for parole is a serious violation of principles of federalism. The error of its decision in this regard is underscored by its many other missteps, each transgressing federalism a little further and each independently warranting certiorari review, on the way to such an improbable result.

CONCLUSION

The consolidated petition for writ of certiorari should be granted.

Respectfully submitted,

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