No. 10-333

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

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF

As this Court ruled in just the last two weeks, federal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law. *Wilson* v. *Corcoran*, No. 10-91 (Nov. 8, 2010) (per curiam). Yet in respondent Cooke's and Clay's cases—as well as in numerous other cases within the courts of the Ninth Circuit—this is exactly what has occurred.[1] In second-guessing the state court's application of its own state-law standard for justifying denial of parole to state prisoners, the Ninth Circuit has untenably intruded on the State's administration of its parole system and has transgressed basic limits on its habeas corpus power.

As seven judges of the Ninth Circuit recently explained, the Ninth Circuit's approach to evaluating habeas corpus challenges to state parole decisions is "completely at odds with AEDPA's plain language." *Pearson* v. *Muntz*, ___ F.3d ___, 2010 WL 4227461, *1 (9th Cir. Oct. 26, 2010) (Ikuta, J., dissenting from denial of rehearing en banc).[2] Without this Court's

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[1] See e.g., *Pirtle* v. *Cal. Bd. of Prison Terms*, 611 F.3d 1015 (9th Cir. 2010); *Johnson* v. *Finn*, No. 06-17042, 2010 WL 3469369 (9th Cir. Sept. 3, 2010); *Sneed* v. *Kane*, No. 07-15061, 2010 WL 3002132 (9th Cir. Aug. 2, 2010); *Slater* v. *Sullivan*, No. 09-17784, 2010 WL 4117080 (9th Cir. Oct. 20, 2010); *Miranda* v. *Carey*, ___ F. Supp. 2d ___, 2010 WL 4010374 (E.D. Cal. Oct. 13, 2010); *Holder* v. *Curry*, ___ F. Supp. 2d ___, 2010 WL 3076822 (N.D. Cal. Aug. 6, 2010). According to petitioners' count, since the certiorari petition was filed on September 2, 2010, federal courts in California have invalidated thirty-two parole decisions that the state court had approved. Thus, since April 2010 when the Ninth Circuit issued the en banc decision in *Hayward* v. *Marshall*, 603 F.3d 546, 559 (9th Cir. 2010) (en banc), the federal courts have invalidated fifty-eight such decisions.

[2] The State has sought en banc review in several (continued...)

intervention, as those judges recognized, the Ninth Circuit's analytic approach "will consistently generate wrong decisions in the hundreds of challenges to California parole decisions adjudicated by federal courts in [the Ninth Circuit] each year." *Id.*

1. Respondents, indeed, have not tried to justify the Ninth Circuit's holding that California's some-evidence standard of judicial review for parole decisions is a component of a "liberty interest" created by the State. Pet. 14, App. 18a. There is simply no precedent for the proposition that an individual has such an interest in a state-created procedural rule. Indeed, this Court has held to the contrary. *Olim* v. *Wakinekona*, 461 U.S. 238, 250-51 (1983).

Instead, respondents Cooke and Clay rely, as did the Ninth Circuit, on the "mandatory-language" methodology announced in *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), for establishing whether a state has created a liberty interest. They argue that "it is clear beyond dispute that a State that creates a right to early release through mandatory parole has created a liberty interest that it [sic] protected by the federal Due Process Clause." Opp. 12 (citing *Cooke* v. *Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010), *Clay* v. *Kane*, 07-55377, ___ Fed. Appx. ___, Slip Op. at 3 (9th Cir.

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AEDPA habeas corpus cases challenging parole decisions. The Ninth Circuit, however, has declined to grant a hearing in each case. See *Pearson*, 2010 WL 4227461 at *1; *Pirtle*, 611 F.3d 1015 (reh'g denied Oct. 20, 2010); *Johnson*, 2010 WL 3469369 (reh'g denied Oct. 20, 2010); *Sneed*, 2010 WL 3002132 (reh'g denied Nov. 12, 2010).

June 18, 2010), and *Pearson* v. *Muntz*, ___ F.3d ___, Slip Op. at 17610 (9th Cir. Oct. 26, 2010)).

The criteria for ascertaining whether a state-created liberty interest exists, however, are uncertain. Pet. 16; *Sandin* v. *Connor*, 515 U.S. 472 (1995); *Wilkinson* v. *Austin*, 545 U.S. 209, 229 (2005). And, as noted, not even respondents defend the Ninth Circuit's crucial holding that California has created a "liberty interest" in a judicial standard of sufficiency-of-evidence review, regardless of what criteria are employed.

2. Anyway, even if California inmates have a constitutionally protected liberty interest in parole, the question would remain: what *federal* process is due to protect that interest? *Ky. Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1989). And this Court has held that due process is satisfied where the inmate has "an opportunity to be heard" and is "inform[ed] . . . in what respects he [fell] short of qualifying for parole." *Greenholtz*, 442 U.S. at 16. Especially under the AEDPA deferential review standard provided in 28 U.S.C. § 2254(d), that should end the inquiry. No holding of this Court "clearly establishes" that federal habeas corpus courts may second-guess state parole-denial decisions or evaluate them for evidentiary sufficiency.

Respondents' argument to the contrary – that this Court's cases clearly establish that due process requires "some evidence" to support a parole denial, Opp. 16-21 – is unavailing. Respondents assert that "the federal requirement of 'some evidence' has long stood as the federal constitutional floor that must be present to meet the due process concern that governmental action is depriving an individual of a protected liberty interest . . . ." Opp. 17. But while this Court has held in some contexts that a

governmental decision must be supported by some evidence, it has never so held in the parole context. As this Court has made clear, a test announced as governing in one context does not "clearly establish" under § 2254(d) that it applies in a different context. *Knowles* v. *Mirzayance*, ___ U.S. ___, 129 S. Ct. 1411 (2009); *Wright* v. *Van Patten*, 552 U.S. 120, 125-26 (2008); *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006).

The parole context makes all the difference here. *Greenholtz* itself emphasized that parole is a discretionary and predictive decision that cannot always be articulated in traditional fact findings. *Greenholtz*, 442 U.S. at 15-16.

By way of contrast, the cases relied on by respondents involve situations that are neither subjective nor predictive. Opp. 18-19. There, the some-evidence standard of review was applied to evaluate an adjudication of retrospective historical facts. Although respondents do not seem to recognize this difference, the Ninth Circuit itself has recognized it. *Hayward*, 603 F.3d at 559 ("The relevant Supreme Court decisions require 'some evidence' for denial of good time, but do not require it for denial of parole, and they carefully distinguish good time from parole."). Still, respondents reassert that it breaks no ground to apply the "some evidence" test established in *Superintendent* v. *Hill*, 472 U.S. 445 (1985) to parole. Opp. 19. But the relevant inquiry is whether this Court has announced that *Hill*'s some-evidence test applies to parole. If, as here, the answer is "no," then relief under AEDPA is not available based on an analysis of respondents' claims under *Hill*.

3. Despite the Ninth Circuit's recognition that there is no independent federal "some evidence"

requirement for state parole, and that the some-evidence test employed in the prison disciplinary context is not applicable to the parole context, respondents inexplicably contend that the Ninth Circuit did not purport to enforce California's "some-evidence" standard instead. Opp. 17. To the contrary, the Ninth Circuit held that federal habeas courts 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 (emphasis added). Indeed, seven judges of the Ninth Circuit recently acknowledged that the Ninth Circuit has embarked on enforcement of California's state-law some-evidence test. They have explained that, contrary to the plain language of § 2254(d), the Ninth Circuit has held "that a California prisoner is entitled to habeas relief because the state court's decision was inconsistent with *California law* as determined by the *California Supreme Court*, or was based on an unreasonable factual determination of a *state law* issue." *Pearson*, 2010 WL 4227461 at *1 (Ikuta, J., dissenting from denial of rehearing en banc) (citing *Pearson* v. *Muntz*, 606 F.3d 606, 611-12 (9th Cir. 2010) (per curiam)). In doing so, the Ninth Circuit has in effect rewritten § 2254(d). *Pearson*, 2010 WL 4227461 at *1, *4 (Ikuta, J., dissenting from denial of rehearing en banc). While the statutory language asks whether the state court's decision was "an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*," the Ninth Circuit asks whether the state court's decision "was an unreasonable

application of *the California some evidence requirement*." Compare 28 U.S.C. § 2254(d)(1) (emphasis added) with *Hayward*, 603 F.3d at 563 (emphasis added).

And this is precisely the analytical framework erroneously employed in respondents' cases. In respondent Cooke's case, the panel framed the issue as "whether the decision of the Alameda County Superior Court was an unreasonable application of *California's* 'some evidence' requirement . . . ." App. 18a (emphasis added). Likewise, in respondent Clay's case 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." App. 67a (emphasis added). The Ninth Circuit thus persists in the same error this Court condemned in *Wilson* v. *Corcoran*.

4. In passing and without explanation, respondents contend that "the State's claim that the habeas relief granted by the Ninth Circuit was 'based on its own view of a state prisoner's suitability for parole,' . . . is irrelevant." Opp. 21. But it is especially untenable and intrusive for federal courts to second-guess such decisions. And, indeed, the court of appeals independently evaluated Cooke's and Clay's parole suitability within the framework of California law. Pet. 6-7, 9-10. This Court has never authorized such federal review of the substance of a state parole decision. Following *Hayward*, *Pearson*, and *Cooke*, however, the federal courts are reviewing the decisions of state courts interpreting and applying state law—in effect serving as super-appellate courts over state-court decisions.

5. Respondents argue that review by this Court is not warranted because, they say, a decision

regarding California's unique parole law will have no practical effect on any other jurisdiction. Opp. 22-26. As indicated in the certiorari petition, even if the effect were limited to California, the number of individuals and cases impacted by the Ninth Circuit's decisions is great. Pet. 11 (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); see also *Pearson*, 2010 WL 4227461 at *1 (Ikuta, J., dissenting from denial of rehearing en banc) (recognizing that there are hundreds of challenges to California parole decisions adjudicated by federal courts in the Ninth Circuit each year).

The fact that California law might guarantee inmate benefits beyond what other states provide should not serve as a license for the Ninth Circuit to grant habeas corpus relief based on state law. Nor should it deter this Court from continuing to ensure faithful enforcement, in the lower courts, of the limits Congress imposed on the scope of the writ in AEDPA.

CONCLUSION

The consolidated petition for writ of certiorari should be granted.

Respectfully submitted,

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